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Be Careful Where You Live When You Die: Termination of Copyright Transfers and the Road to Marriage Equality

R. Anthony Reese

treese@law.uci.edu

University of California, Irvine ~ School of Law

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BE CAREFUL WHERE YOU LIVE WHEN YOU DIE: TERMINATION OF COPYRIGHT TRANSFERS AND THE ROAD TO MARRIAGE EQUALITY

R. Anthony Reese[*]

INTRODUCTION

For more than five decades, gay and lesbian Americans have fought for equal treatment under the law. That fight has rarely, if ever, been waged over the provisions of copyright law. Indeed, modern copyright law for the most part makes no distinctions in how it treats authors based on their sexual orientation. In recent years, the most prominent aspect of the campaign for equal rights for gay men and lesbians has been the fight for marriage equality, and substantial progress has been made toward that goal. The struggle for marriage equality, though, highlights one aspect of copyright law—its termination of transfers regime—which has discriminated against, and continues to discriminate against, gay and lesbian authors and their partners.

Part I briefly explains the termination provisions of current copyright law, which were enacted by Congress in 1976 and took effect in 1978. Using the experience of a hypothetical author, Part II then traces how the operation of the termination provisions has evolved from 1978 to the present day. This history shows how at every stage of that evolution copyright law has treated gay and lesbian authors less favorably than heterosexual authors. This Part also explains the remaining inequality in copyright's termination regime. Part III explains how copyright law's discriminatory treatment resembles many of the other instances in which gay and lesbian couples have suffered unequal treatment under the law, and also resembles another instance in copyright history of discrimination against authors' spouses on the basis of gender. Part IV considers how the possible outcomes of the *Obergefell v. Hodges* case in the Supreme Court this summer could eliminate, reduce, or perpetuate copyright's current discrimination against gay and lesbian authors, and looks at a number of ways to end that discrimination if the Court's decision does not do so. This

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Part also reveals the international dimension of copyright's inequality, by examining the way the law treats authors who live (and die) outside the United States and notes that achievement of uniform domestic marriage equality would not remedy that international inequality. Finally, Part V outlines some practical steps that gay and lesbian authors can take to try to minimize the discriminatory effect of copyright's termination regime as long as it remains.

I. COPYRIGHT'S TERMINATION OF TRANSFERS REGIME

Copyright law has long included a mechanism by which authors of copyrighted works who transferred away their copyrights could, after the passage of time, reclaim ownership of those copyrights.[1] This reversion-of-rights mechanism in copyright law is premised on a view that "works that continue to enjoy commercial value" over a long period of time "are more likely to owe their success to the genius of their authors than to the capital and labor contributed by the author's assignees or licensees" and therefore "the author has the stronger entitlement to the revenues earned" by the work in the later years of its copyright term.[2] Reversion allows the author who has reclaimed her copyright to renegotiate new—and potentially more lucrative—deals with those who wish to use the work after the reversion.

Before 1978, U.S. copyright law allowed ownership of a transferred copyright to revert to the author (or to the author's family) by dividing copyright protection into an initial term and a renewal term and by providing that if the copyright was renewed, ownership of the renewal term vested in the author or her statutorily designated successors. The 1976 Copyright Act eliminated the divided-term renewal system in favor of a unitary term of copyright protection.[3] Adopting a unitary term meant that renewal was no longer available to effectuate reversion of ownership to the author. The 1976 Act's drafters, however, believed that reversion was still desirable.[4] So the statute included a new reversion mechanism: the law

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[1] See generally Lionel Bentley & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L. J. 1475.

[2] 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 5.4, at 5:113 (3d ed. 2005, 2012 Supp.).

[3] 17 U.S.C. § 302. The 1976 Act retained the renewal system for works that were copyrighted before its effective date. *Id.* at § 304(a), (b). H.R. REP. 94-1476, at 139–40.

[4] "The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part

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gives an author (or her statutorily designated successors) the right to terminate grants of copyright ownership. This provision essentially gives authors or their successors an opportunity to undo transfers or licenses once 35 years have passed after the grant was made.

The remainder of this Part summarizes the scope and mechanics of termination, codified in section 203 of the current statute.

Which Grants May be Terminated? Section 203 applies broadly to any grant of a transfer or an exclusive or nonexclusive license of any copyright or any copyright right.[5] But its application is limited to grants that are executed by the author, not by any other persons, and only to grants executed on or after January 1, 1978 and not before.[6] In addition, under Section 203, authors' grants by will are exempted (so that only inter vivos transfers are terminable), and termination is not available if the work involved is a work made for hire.[7]

Who May Terminate A Grant? The statute dictates who may decide whether to terminate a grant that is subject to termination. The basic principle of Section 203 confers the termination right on the author herself.[8] If an author is dead, however, the statute specifies who is entitled to terminate that author's grants. These provisions will be examined in detail in Part II, but as originally enacted, the statute essentially vested a deceased author's Section 203 termination interest in the author's surviving spouse and/or surviving children or grandchildren.[9]

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from the impossibility of determining a work's value until it has been exploited." H.R. REP. 94-1476, at 124.

[5] 17 U.S.C. § 203(a).

[6] 17 U.S.C. § 203(a). Certain grants of copyright rights made before January 1, 1978, are subject to termination under a parallel statutory provision. 17 U.S.C. § 304(c). The analysis in Part II of how section 203 applies to authors' same-sex partners is largely applicable to termination under § 304(c) as well.

[7] 17 U.S.C. § 203(a). The definition of "work made for hire" in 17 U.S.C. § 101 covers both employee-prepared works and certain specially commissioned works, and imposes several formal requirements in order for works in the latter category to qualify. See Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). If a work is made for hire, then U.S. law considers the hiring party to be the work's author, and copyright ownership vests ab initio in the hired party, 17 U.S.C. § 201(b), so that there is no transfer from the employee or independent contractor to the hiring party that would be subject to Section 203 in any event, but that latter section is nonetheless explicit in entirely excluding grants in works made for hire from its scope.

[8] 17 U.S.C. § 203(a)(1). If the work is jointly authored, and more than one author signed the grant that is subject to termination, then termination requires a majority of the signers to agree to terminate. *Id.* See generally Scorpio Music S.A. v. Willis, 102 U.S.P.Q.2d 1606 (S.D.Cal. 2012).

[9] 17 U.S.C. § 203(a)(2). As discussed below, the statute was amended in 1998 by the Sonny Bono Copyright Term Extension Act to allow termination by the author's "executor, administrator, personal representative, or trustee" if no spouse, child, or grandchild survives the author. *See, infra*, text accompanying notes 31–35.

Rather complicated provisions govern the proportionate shares of the termination interest owned by the author's surviving spouse, children, and/or grandchildren. If the author leaves only a surviving spouse, the spouse owns the entire termination interest.[10] Similarly, if the author leaves only surviving children and/or grandchildren, then together they own the entire termination interest.[11] If the author leaves both a surviving spouse and any surviving children and/or grandchildren, then the surviving spouse owns 50% of the termination interest, and the surviving issue own the other 50%.[12] If more than one person owns the author's termination interest, the statute requires that those who "own and are entitled to exercise a total of more than one-half of that author's termination interest" must act in order for the termination to be effected.[13]

When and How May A Grant Be Terminated? Section 203 provides a five-year period during which termination may take place.[14] Termination can be effected at any point during that window, which generally begins to run "at the end of thirty-five years from the date of execution of the grant."[15] If no termination is effected while the window is open, the transfer or license continues in force under its own terms.

Those who wish to terminate an eligible grant do so by serving a signed, written notice of termination upon the grantee (or the grantee's successor in title).[16] The notice must specify the date during the termination window on which the termination is to be effective and must be served "not less than two or more than ten years before that date."[17]

Effect of Termination. Once a proper termination is effective, most of the U.S. copyright rights that were originally conveyed by the author in the

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[10] 17 U.S.C. § 203(a)(2)(A).

[11] 17 U.S.C. § 203(a)(2)(B), (C). The interest is "divided among them and exercised on a per stirpes basis according to the number of such author's children represented." *Id.* at § 203(a)(2)(C).

[12] 17 U.S.C. § 203(a)(2)(A)-(C). Again, the interest of the author's issue is divided and exercised on a per stirpes basis.

[13] 17 U.S.C. § 203(a)(1).

[14] 17 U.S.C. § 203(a)(3).

[15] 17 U.S.C. § 203(a)(3). The statute provides an alternative rule for calculating when the termination window begins if the grant in question confers "the right of publication" in the work. In that case, the window opens on the earlier of two dates: the end of thirty-five years from the date of the work's publication under the grant, or the end of forty years after the date the grant was executed. *Id.* "This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work." H.R. REP. No. 94-1476, at 126.

[16] 17 U.S.C. § 203(a)(4).

[17] 17 U.S.C. § 203(a)(4)(A). A copy of the notice must be recorded in the Copyright Office before the effective date of termination "as a condition to its taking effect." *Id.*

terminated grant revert to the terminating party.[18] The terminating party may then exercise the rights herself, or grant them away again.[19] If the work still retains commercial value after 35 years, the termination mechanism thus allows the author or her successors to attempt to negotiate a better deal than the author received in the initial transfer and reap more of the revenues earned by the work going forward.

II. THE STORY OF ALISON AND SAM

The termination provisions just summarized are one of the very few places where copyright law interacts with marriage law, and through this interaction copyright's termination provisions have, since taking effect in 1978, treated gay and lesbian authors and their same-sex partners less favorably than heterosexual authors and their different-sex partners, although the nature of the inequality has changed over time. This section details this unequal treatment by tracing the situation of a hypothetical couple under the law (a) as originally enacted in 1978, (b) as amended in 1998, (c) as applied after 2004 when same-sex couples were first able to legally marry, and (d) as applied after the Supreme Court decided *United States v. Windsor* in 2013.

A. 1995

Consider a hypothetical couple, Alison and Sam, living in Boston in 1995.

Alison and Sam are not married, but they have lived together for five years. They are financially interdependent, having joint bank accounts, loans, and property interests. They are each other's sole partner, they are in

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[18] 17 U.S.C. § 203(b). U.S. rights other than copyright rights, such as, for example, trademark rights, as well as rights conferred under foreign laws, are not affected by termination. 17 U.S.C. § 203(b)(5).

One important limitation on the effect of termination concerns derivative works. If a terminated grantee prepared a derivative work under the terminated grant before termination occurred, then that derivative work "may continue to be utilized under the terms of the grant after its termination." 17 U.S.C. § 203(b)(1). This limitation makes clear that "this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." *Id.* So, for example, if a novelist granted a movie studio the right to make a film version of her novel and to use the copyright for that purpose during the renewal term, and if the studio made that film version, and if the novelist later terminates the grant of renewal-term rights to the studio, the studio may continue to exploit the film version, provided it continues to comply with the terms of the original grant from the novelist.

[19] The statute governs how and when further grants of rights covered by a terminated grant can be made. 17 U.S.C. § 203(b)(3), (4).

a long-term committed relationship, and they intend to remain partners indefinitely.

Alison is an author, and has just published, to glowing critical reviews and popular success, a first novel. As a relative unknown before publication, Alison signed a contract assigning the novel's copyright to BigPubCo, a major publishing house, on terms far less lucrative than a more established novelist would have received.

Alison's copyright assignment to BigPubCo meets the conditions for termination under section 203.[20] It is an inter vivos transfer of copyright rights signed by the author after 1977, and Alison's novel is not a work made for hire.[21] As a result, Alison's 1995 assignment will be subject to termination during a five-year window from 2030 to 2035.[22] A notice of termination could be served on BigPubCo as early as 2020 or as late as 2033.[23]

Alison hopes that her novel will continue to be popular and financially successful. She knows about copyright law's termination of transfer provisions, and she hopes that, when the time comes, terminating the transfer to BigPubCo will allow her to negotiate a better deal that will provide an increased financial return to her and to Sam in their later years. If Alison is still alive when 2020 arrives, she will be the proper party to serve a notice of termination.[24]

But in 1995, 2020 is still a long time in the future, and Alison is smart enough to engage in some estate planning. Alison would like to be sure that, if she dies before 2020 and Sam survives her, then Sam will be able to terminate the transfer to BigPubCo and rely on the income from a renegotiated copyright assignment for financial support. As Alison engages in her estate planning in 1995, making a valid will leaving her entire estate to Sam, what could Alison expect as to whether Sam will be able to terminate the assignment if Alison is already dead when the time comes to terminate?

Under section 203 as enacted in 1976 and in force in 1995, Sam would not be able to terminate the assignment to BigPubCo, despite having

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[20] 17 U.S.C. § 203.

[21] 17 U.S.C. § 203(a).

[22] 17 U.S.C. § 203(a)(3). This assumes that the transfer to BigPubCo was "executed" in 1995, before the novel was published later that year.

[23] 17 U.S.C. § 203(a)(4).

[24] 17 U.S.C. § 203(a)(1).

inherited all of Alison's estate.[25] Section 203 dictates who is entitled to exercise the termination right if the author is not living while the window for serving a termination notice is open. In 1995, section 203 provided that if the author was dead, only the author's widow or widower, and/or any surviving children (together with any grandchildren of any deceased child of the author), could exercise the deceased author's termination right.[26] The statute defines " 'widow' or 'widower' "[27] as the author's surviving spouse under state law, so because Alison and Sam are not married, Sam would not qualify under the statute as an owner of Alison's termination interest and would not be able to terminate the assignment to BigPubCo. Indeed, in 1995, if Alison is not married to Sam and has no issue, she should anticipate that after she dies no one would ever be able to terminate her assignment under section 203.[28]

To understand how these termination provisions discriminate against gay and lesbian authors and their same-sex partners, consider the implications of section 203 for two different, but nearly identical, versions of our hypothetical couple. In both versions, Alison is a woman. But in one version, "Sam" is short for "Samuel" and Alison's partner is male; in the other "Sam" is short for "Samantha" and Alison's partner is female.[29] Facially, federal copyright law treats these identically situated different-sex and same-sex unmarried couples identically. Because each couple is unmarried, neither Samuel nor Samantha meets the definition of " 'widow' or 'widower' " and thus is not entitled to terminate Alison's copyright assignment.

This facially equal treatment, however, hides an underlying inequality. Copyright law's definition of " 'widow' or 'widower' " turns on whether the author is survived by a "spouse" as recognized by state law. In 1995, Alison & Sam's home state of Massachusetts, like every other state in the nation at that time, allowed different-sex couples but not same-sex couples

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[25] This could include all of Alison's other copyright interests, such as the copyrights in any unpublished works that Alison has left behind and the contractual right to receive royalty payments from BigPubCo on the continuing sales of Alison's first novel.

[26] Pub. L. No. 94–553, sec. 101, § 203(a)(2)(A)–(C), 90 Stat. 2541, 2569.

[27] 17 U.S.C. § 101.

[28] The law that became the 1976 Copyright Act was crafted during the twenty-year revision period, and the first version of the termination provisions proposed during this period allowed termination by the author's "legal representatives, legatees, or heirs" if the author was dead when the time for termination arrived. H.R. 11947 and S. 3008, § 16, 88th Cong. (1964). Had that version been enacted, Alison could presumably have designated Sam by will as the person able to terminate after Alison's death.

[29] *See, e.g.*, Dick Gallagher & Mark Waldrop, *Sam and Me*, WHEN PIGS FLY (RCA Victor 1997).

to marry.[30] So while federal law would bar Alison's *unmarried* partner Sam (of either gender) from acquiring any termination interest, Alison and *Samuel* could eliminate that bar at any time simply by getting married, which they could do under the law of every state in the nation in 1995. Alison and *Samantha*, by contrast, could not eliminate the bar by marrying in *any* state in the nation in 1995, and Alison would have no path to ensuring that Samantha, as her survivor, would acquire the right to terminate Alison's assignment to BigPubCo if Alison herself did not survive until the time came to terminate.

Thus, starting in 1978 (when the termination provisions took effect), federal copyright law, while providing facially equal treatment to authors with unmarried partners, regardless of the partner's gender, in fact incorporated by reference every state law's unequal treatment of those authors. If an author had a same-sex unmarried partner, state law would prevent the author from marrying that partner, and copyright law would defer to that state-law bar and refuse to recognize the unmarried (and unmarryable) partner as the author's survivor for termination purposes.

B. 1998

The situation for Alison remained the same until 1998. That year, as part of the Sonny Bono Copyright Term Extension Act,[31] Congress amended section 203 and allowed for better treatment for an author's unmarried partner. The amendment expanded the statutory list of successors entitled to terminate a deceased author's grant, so that if an author dies without a widow or widower, and without any surviving child or grandchild, then the deceased author's termination interest can be exercised by a survivor designated in the author's will (or by intestate succession).[32] This amendment for the first time allowed an author with an unmarried partner to designate that partner as entitled to terminate the author's copyright grants after the author's death.

Under the amended version of section 203, what could Alison expect as to Sam's ability to terminate Alison's assignment to BigPubCo if Alison were to die in 1999? Whether Alison's partner was Samuel or Samantha,

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[30] *See* United States v. Windsor, 133 S.Ct. 2675, 2689 (2013) ("When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right."); Baker v. Nelson, 409 U.S. 810 (1972), dismissing appeal of 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1977); Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973).

[31] Pub. L. 105-298, 112 Stat. 2827.

[32] Pub. L. 105-298, § 103, 112 Stat. 2827, 2829 (codified at 17 U.S.C. § 203(a)(2)(D)). The added subsection provides in full: "In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest."

Sam would still not be able to terminate Alison's assignment as her " 'widow' or 'widower' " under section 203(a)(2)(A), because Alison and Sam are still not married under state law. However, if Alison had made a valid will leaving her termination interest to Sam, then under § 203(a)(2)(D), Sam would be entitled to terminate Alison's assignment.[33]

An important caveat, however, is that Alison could effectively bequeath her termination interest to Sam only if Alison is not survived by any child or grandchild. If Alison had any living children or grandchildren when the time came to terminate, then under section 203, the surviving child or grandchild would own the *entire* termination interest, and Alison's bequest of that termination interest to Sam would be ineffective.[34] Even if Alison's will provided that the termination interest should be equally shared by Sam and by Alison's surviving child, the statutory order of succession in favor of the child would trump. In essence, the statute imposes a compulsory bequest of the termination interest to the statutorily designated successors—in this case, the author's offspring.[35]

After the 1998 amendment, then, Alison and Sam are better off than they were before. Alison can provide Sam with the opportunity to terminate the BigPubCo assignment, at least if Alison has the foresight to bequeath the termination interest to Sam, expends the time and resources necessary to do so, and has no surviving children. But Alison and *Samantha* are still worse off than Alison and *Samuel*. While both couples are in the same position as long as they are unmarried, Alison and Samuel can still marry at any time under the laws of every state. And marrying offers the different-sex couple at least two advantages. First, Alison can ensure that Samuel will be able to terminate her assignment after her death without the expense of creating a will or trust. Second, marrying ensures that Samuel will own at least half of the termination interest even if Alison is survived by any children or grandchildren, because section 203 provides that if the author leaves both a widower and any issue, then the widower owns half of the termination interest and the children and/or grandchildren own the

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[33] Alison could presumably leave her termination interest to Sam either by a specific bequest of that interest or by leaving her entire estate to Sam.

[34] Alison's children or grandchildren *might*, of course, choose to share any proceeds from the termination with Samantha as Alison's surviving partner, but they would be under no obligation to do so. And even surviving spouses and children who legally share the termination interest do not always enjoy a harmonious relationship. *See, e.g.*, Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008) (involving dispute over termination between author's surviving spouse and author's surviving children from a previous marriage).

[35] See De Sylva v. Ballentine, 351 U.S. 570, 582 (1956) (describing parallel provisions in the 1909 Act governing entitlement to secure a renewal copyright as "tak[ing] the form of a compulsory bequest of the [renewal] copyright to the [statutorily] designated persons.").

remaining half. Alison and Samantha still cannot obtain those advantages, because they cannot legally marry anywhere in the country.

The 1998 amendment thus somewhat ameliorated copyright law's unequal treatment of an author's same-sex unmarried partner. The basic framework remained the same. Federal copyright law treated authors' unmarried partners, regardless of gender, as equally unable to qualify as a " 'widow' or 'widower' " entitled to exercise the deceased author's termination right, while incorporating by reference the laws of all 50 states that allowed authors to marry their different-sex partners but prevented them from marrying their same-sex partners. But copyright now offered an author with an unmarried (and unmarryable) same-sex partner an alternative mechanism to allow the partner to exercise the author's termination interest after the author's death: leaving the interest to the partner by will.[36] That mechanism is an imperfect substitute for statutory status as a " 'widow' or 'widower.' " It requires advance planning by the author, and even with such planning it will only be available if the author has no surviving children. But it is nonetheless an advance over the situation of the previous twenty years, when an author had no means whatsoever to provide for her surviving same-sex partner to be able to exercise her termination interest after her death.

C. 2004

The next important development in the story of Alison and Sam occurred in 2004. Copyright law recognizes as a " 'widow' or 'widower' " only an author's spouse under state law, and until then state law only allowed different-sex couples to marry. Alison and Samuel could get married at any time and thereby qualify Samuel as Alison's "spouse," while Alison and Samantha could not do so. But in 2004, Alison and Sam's home state of Massachusetts became the first state to allow same-sex couples to marry.[37] The Supreme Judicial Court of Massachusetts ruled on November

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[36] The provision would also appear to allow an author to leave her termination interest to her same-sex partner by means of a will substitute, such as a trust, given the language allowing termination by the author's "executor, administrator, personal representative, or trustee."

[37] The issues raised in this section could have arisen earlier, as some foreign jurisdictions allowed same-sex couples to marry before Massachusetts did. The Netherlands legalized same-sex marriage effective in 2001, and Belgium and three Canadian provinces followed in 2003. WILLIAM N. ESKRIDGE, JR. AND DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 84 (2006). As discussed in Part IV.C., *infra*, the Copyright Act's definition of "widow or widower" looks to the law of the author's domicile to determine whether an author is married, and the termination right appears to apply equally to assignments of U.S. rights by foreign authors, whose marriage would be subject not to the jurisdiction of any American state, but of the nation (and potentially the subdivision of the nation) in which they reside. I am not aware of any attempted terminations by a same-sex spouse of a deceased foreign-domiciled author after 2001.

18, 2003, that denying same-sex couples the right to marry violated the commonwealth's constitution.[38] On May 17, 2004, same-sex couples began to marry in Massachusetts.[39] From that date forward, Alison and Samantha could marry in their state, just as Alison and Samuel could.

If Alison and Samantha did marry in Massachusetts in 2004, how would that affect the possible termination of Alison's assignment to BigPubCo if Samantha survived Alison? Prior to 2004, the Copyright Act's incorporation by reference of state marriage law effectively incorporated only state marriage law that treated same-sex couples unequally, since no state allowed same-sex couples to marry. But with the watershed change in Massachusetts law, the federal Copyright Act now incorporated not only the unequal marriage laws of most American states, but also the *equal* treatment of Massachusetts marriage law. Once Alison and Samantha were legally married in Massachusetts, if Alison were to die before exercising her termination interest, then Samantha would qualify as Alison's "widow" for purposes of section 203(a)(2)(A), because she would be Alison's surviving spouse under Massachusetts law. Regardless of whether Alison had a will (or whether that will left the termination interest to Samantha), Samantha would own Alison's termination interest—she would either solely own 100 percent of the termination interest (if Alison left no surviving kids or grandkids) or she and Alison's surviving children (and possibly grandchildren) would collectively own the termination interest (with Samantha owning a 50 percent share).[40] Copyright law would now truly treat authors' unmarried partners equally, regardless of gender, at least in Massachusetts (though not anywhere else in the United States). In the absence of a bequest by Alison, neither Samantha nor Samuel would be entitled to terminate Alison's assignment if not married to Alison, but under Massachusetts law Alison could freely marry either Samantha or Samuel and thereby turn her unmarried partner (of either gender) into her "spouse" for purposes of copyright law.

This advance toward equality under copyright law for gay and lesbian authors and their same-sex partners was not, however, as effective as at first appears. In fact, even after Massachusetts permitted same-sex marriage, Samantha and Samuel were *not* treated equally for copyright termination purposes. Massachusetts marriage law and federal copyright law were not the only relevant legal provisions determining ownership of the termination

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[38] Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).

[39] Mary L. Bonauto, Goodridge *in Context*, 40 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 1, 44–45 (2005).

[40] 17 U.S.C. § 203(a)(2)(A)–(C).

right. Alison and Samantha's rights were also governed by another federal law, the so-called "Defense of Marriage Act" (DOMA).[41] DOMA was enacted in 1996, motivated by the possibility at the time that Hawai'i would permit same-sex marriage.[42] Section 3 of DOMA added the following language to Title 1 of the United States Code:

> In determining the meaning of any Act of Congress, . . . the word "marriage" means only a legal union between one man and one woman as husband and wife, and *the word "spouse" refers only to a person of the opposite sex who is a husband or a wife*.[43]

As a result, while federal *copyright* law would treat Samantha and Samuel equally with respect to Alison's termination right, federal non-copyright law, in the form of section 3 of DOMA, would override both Massachusetts's equal treatment of its own same-sex residents and copyright law's statutory recognition of that equal treatment. Because DOMA required reading the term "spouse" in Title 17's definition of "widow or widower" to encompass only "a person of the opposite sex", Samantha would not qualify under federal law as Alison's spouse for purposes of determining ownership of the right to terminate Alison's copyright assignment after Alison's death—even though the law of Alison and Samantha's home state recognized Samantha as Alison's spouse *and* the copyright statute looks to that state law to determine whether Alison has a widow or widower. By enacting DOMA, Congress essentially barred copyright law from treating authors' same-sex and different-sex partners equally, even when the authors and their partners were legally married under state law.[44]

Section 3 of DOMA meant Massachusetts' decision to allow same-sex couples to marry starting in 2004 had no practical effect on Alison and Samantha with respect to copyright's termination interest. Even though they could now legally marry in Massachusetts, Alison and Samantha remained in the same position they had been in since 1998: Samantha could not qualify as Alison's "widow" in order to acquire the termination right under section 203(a)(2)(A), and so could only acquire the right through Alison's will (if she had one), and only if Alison left no surviving children or

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[41] 110 Stat. 2419.

[42] United States v. Windsor, ___ U.S. ___, ___ 133 S.Ct. 2675, 2682–83 (2013).

[43] 1 U.S.C. § 7 (emphasis added) (held unconstitutional by United States v. Windsor, ___ U.S. ___, 133 S.Ct. 2675 (2013)).

[44] See Brad A. Greenberg, *DOMA's Ghosts and Copyright Reversionary Interests*, 108 NORTHWESTERN U. L. REV. COLLOQUY 102, 105 (2014); Alvin Deutsch & Jeremey A. Schachter, *Gay Right to Terminate Under the 1976 Copyright Act*, 31 CARDOZO ARTS & ENT. L. J. 275, 287–289 (2013).

grandchildren. DOMA allowed copyright law to incorporate by reference the state-law unequal treatment of same-sex couples in 49 states, but prevented it from incorporating by reference Massachusetts' *equal* treatment of such couples.

D. 2013

In 2013, the Supreme Court in *United States v. Windsor*[45] held that section 3 of DOMA violated the equal protection guarantee of the U.S. constitution. In striking down this part of DOMA, the Supreme Court eliminated the overlay of inequality that law had imposed on copyright law. As a result, if Alison and Samantha were legally married in Massachusetts—or in any of the 12 other jurisdictions that allowed same-sex marriage when the Court decided *Windsor*[46]—then in the event of Alison's death, Samantha would meet the copyright act's definition of "widow" and would own at least half of Alison's termination interest under section 203(a)(2)(A). Copyright law would now treat Alison and Samantha just as it treated Alison and Samuel.

Of course, this equal treatment is not yet available nationwide. Many states in the nation do not allow same-sex couples to marry and do not recognize same-sex marriages entered into elsewhere.[47] So, for example, an author and her same-sex partner who live in Georgia, which does not allow the couple to legally marry,[48] would be in the same position Alison and Samantha were in before 2004 in Massachusetts: the author's partner couldn't qualify as her "widow."

The lack of uniform equal treatment for same-sex couples under state marriage laws creates complications for questions of marital status, including those in copyright law. If a same-sex couple from Georgia travels to Massachusetts, marries there, and then returns home to Georgia, are they married in Georgia? Indeed, what if Alison and Sam, having married in Massachusetts, decide in 2015 as they near their 60s to move to Atlanta? (Many couples from the Northeast retire to the warmer climes of the Southeast, after all.) Can Alison still expect that if she dies before the time comes to terminate, Sam, as her spouse, will be able to exercise her termination interest and potentially enjoy a more financially secure retirement?

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[45] ___ U.S. ___, 133 S.Ct. 2675 (2013).

[46] United States v. Windsor, ___ U.S. ___, ___133 S.Ct. 2675, 2689 (2013) (noting that at the time of the decision New York and "11 other states and the District of Columbia" allowed same-sex couples to marry).

[47] See text accompanying notes 91–92.

[48] O.C.G.A. § 19-3-3.1(a)–(b); Georgia Constitution, art. I, § IV, para. I(a)–(b).

These situations present a classic conflict of laws problem.[49] The law of the state where the couple entered into the marriage (the state of celebration) treats the couple as validly married. The law of the state where the couple now lives (the state of domicile) would not allow the couple to marry. Determining whether the couple qualifies as married requires choosing which law governs—the law of the state of celebration or of the state of domicile? Of course, just because Alison and Samantha could not enter into a marriage in Georgia does not mean that Georgia would necessarily not recognize the couple as married. It has long been common for the state in which a couple lives to recognize the couple as validly married if the couple's marriage was valid under the law of the state where it was celebrated, even though the couple could not have legally gotten married in the state in which they now live. States often choose to apply the law of the state of celebration, rather than their own law as the state of domicile, in determining whether a couple is married.[50] But this traditional generosity to recognizing out-of-state marriages has not so far generally been extended to marriages of same-sex couples (at least in states that do not themselves allow such couples to marry). Instead, same-sex married couples who relocate may face difficulties under the traditional view that their new state of domicile will not recognize a marriage entered into elsewhere if doing so would violate a strong public policy of that state.[51] Many states now have express legal provisions (usually enacted in the last two decades) barring recognition of marriages of same-sex couples performed in other jurisdictions.[52]

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[49] A robust literature on the question of same-sex marriage and conflict of laws has developed over the last twenty years. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, U. CINCINNATI L. REV. 339 (1998); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005); Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421 (2012).

[50] See, e.g., CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 277 (2010).

[51] *Id.* See also Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998).

[52] See, e.g., Harry Anastopulos, *Jurisdictional Russian Roulette: The Intersection of Comity, Family Security, and Access to Same-Sex Divorce*, 14 GEO. J. OF GENDER & L. 133, 144–45 (2013) ("Forty . . . states enacted explicit language into their state constitutions or statutes that prohibits recognition of valid out-of-state same-sex marriages.") (listing state provisions); Andrew Koppelman, *Recognition and Enforcement of Same-Sex Marriage*, 153 U. PENN. L. REV. 2143, 2140 (2005) ("Forty states have laws on the books declaring that they will not recognize foreign same-sex marriages and that such marriages are contrary to their public policy.").

The result is that even with the advent of marriage equality in Massachusetts and other states, and even with the invalidation of section 3 of DOMA, copyright law still treats Alison and Samantha and Alison and Samuel unequally in these circumstances. This is because for purposes of defining " 'widow' or 'widower' ", the current copyright statute expressly chooses which law to look to in determining who qualifies as an author's widow or widower for termination purposes. The statute defines the author's " 'widow' or 'widower' " as "the author's surviving spouse *under the law of the author's domicile* at the time of his or her death."[53] This choice-of-law rule represents a remaining inequality in copyright law even for authors legally married to their same-sex partners.[54] It means that if Alison wishes to be sure that Samantha will be able to terminate Alison's copyright assignments in the event that Alison predeceases Sam, then Alison must be careful where she lives (and is domiciled) when she dies.

If Alison and Samantha move from Massachusetts to Atlanta, they become domiciled in Georgia. If Alison dies while they are domiciled there, then in determining who, if anyone, is Alison's widow or widower for copyright purposes, the statute mandates looking to Georgia law to decide who, if anyone, is Alison's "surviving spouse." For purposes of section 203(a)(2)(A), then, what will determine Samantha's status is not the law of Massachusetts, the state where her marriage to Alison was legally celebrated (and where Alison and Sam were domiciled when they were married), but rather the law of Georgia, where Alison was domiciled at the time of her death.

Georgia, by both statute[55] and constitutional provision,[56] both does not allow same-sex couples to marry *and* does not recognize marriages of same-sex couples performed elsewhere.[57] As a result, Samantha will not qualify under Georgia law as Alison's surviving "spouse", and therefore she will not qualify under federal copyright law as Alison's "widow." Once again, only if Alison has bequeathed her termination interest to Samantha (and not

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[53] 17 U.S.C. § 101.

[54] See Brad A. Greenberg, *DOMA's Ghosts and Copyright Reversionary Interests*, 108 NORTHWESTERN U. L. REV. COLLOQUY 102, 106 (2014).

[55] O.C.G.A. § 19-3-3.1(a)–(b).

[56] Georgia Constitution, art. I, § IV, para. I(a)–(b).

[57] Current understandings of the Constitution's Full Faith and Credit Clause would not likely compel Georgia to recognize Massachusetts' valid marrying of Alison and Samantha, and section 2 of DOMA explicitly provides that "states are not required to recognize same-sex marriages from other states." William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STANFORD L. REV. 1371, 1390-92 (2012).

left any surviving issue) will Samantha be able to terminate Alison's assignment to BigPubCo.

By contrast, if Alison and Samuel marry in Massachusetts, Samuel will be recognized as Alison's spouse not only by Massachusetts, but also by any other state to which they might move. Every state in the U.S. generally recognizes marriages performed between different-sex couples in every other state.[58] If Alison and Samuel move to Atlanta, then Georgia will recognize their Massachusetts marriage as valid and will recognize Samuel as Alison's surviving spouse if Alison dies. Samuel will therefore qualify under section 203 as Alison's "widower" and will automatically own either half or all of the interest in terminating Alison's assignment to BigPubCo.

Again, copyright law continues to treat an author's same-sex partner worse than it treats an author's different-sex partner. Alison and Samantha can expect the same treatment as Alison and Samuel only if they are careful to make their home in a state that recognizes same-sex marriage. If Alison dies domiciled in a state (such as Massachusetts or New York) that recognizes her marriage to Samantha, then federal copyright law will recognize Samantha as Alison's widow and the owner of at least half of Alison's termination interest. But if Alison dies domiciled in a state, such as Georgia, that does not recognize her legal marriage to Samantha, then federal copyright law will not recognize Alison and Samantha's marriage, even though it was legal in the state where it was celebrated. In these circumstances, copyright law will not treat Samantha as Alison's widow, but instead will treat her as a legal stranger to Alison, without any claim by marriage to be able to exercise Alison's termination interest. Even after the *Windsor* Court struck down section 3 of DOMA, copyright law's choice-of-law rule for marriage recognition continues to incorporate by reference state-law unequal treatment of same-sex couples. After nearly four decades, copyright law treats Alison and Samantha much better than it did when the 1976 Copyright Act took effect on January 1, 1978, but it still does not treat them as well as it treats Alison and Samuel.

[58] See note 50, *supra*. There may be some non-gender related reasons why one state would not recognize a marriage performed in another state—e.g., degree of consanguinity—but those would apply equally to Alison and Samuel and Alison and Samantha if the two parties in each marriage were related in the same degree.

III. COPYRIGHT TERMINATION & MARRIAGE INEQUALITY IN CONTEXT

A. Same-Sex Couples and Marital Benefits Generally

The inequality of copyright's termination provisions is worth understanding simply because it imposes disadvantages on authors with same-sex partners (and on those partners) that it does not impose on different-sex couples. But the history of the termination provisions also offers a useful example of the spectrum of inequalities that same-sex couples have faced because of discriminatory marriage laws. The unequal treatment that Alison and Samantha have faced with respect to termination of transfers over the last three decades is in no way unique to copyright law, but is instead representative of the ways that unequal marriage laws limit or deny benefits to same-sex couples that are available to their similarly situated different-sex counterparts.

Many benefits are available only to married partners (or surviving spouses), and when a couple cannot get married under state law, those benefits are simply unavailable. For example, Social Security survivors benefits are available only to the widow or widower of a deceased worker who has earned enough credits to qualify. If a same-sex couple like Alison and Samantha cannot get married, then if Alison dies, Samantha cannot qualify as her "widow" in order to obtain those survivors benefits.[59] Similarly, preferential treatment for surviving spouses under the federal estate tax requires that the survivor and the deceased have been legally married,[60] so unmarried surviving partners do not qualify. For these benefits, if Alison and Samantha cannot marry, they are in the same position as they were with respect to copyright termination from 1978 until 1998: the only way to obtain the benefit was to be married, and marriage was universally unavailable.

Same-sex couples simply have no way to obtain marital benefits such as Social Security benefits or preferential estate-tax treatment if they cannot marry. Other marital benefits are available only to married couples, but unmarried same-sex couples may be able to engage in private ordering to achieve a result that approximates the benefit. For example, if a married person dies without a will, state intestacy law generally provides that the deceased person's spouse will inherit all or a portion of the decedent's

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[59] See 42 U.S.C. § 402(e), (f) (establishing widow's and widower's insurance benefits, respectively); 42 U.S.C. § 416(c), (g) (defining "widow" and "widower," respectively). This inequality has been true for many decades. *See, e.g.*, E. CARRINGTON BOGGAN ET AL., THE RIGHTS OF GAY PEOPLE: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK 119–120 (1975).

[60] *See, e.g.*, United States v. Windsor, ___ U.S. ___, 133 S.Ct. 2675 (2013).

property.[61] If a same-sex couple cannot get married, then the decedent's survivor will not qualify as a surviving spouse and will not be entitled to inherit under state intestacy law.[62] However, each person in a same-sex couple can make a legally valid will leaving all or a portion of her property to the other, so that upon that person's death, the decedent's survivor will inherit under the will, even though the surviving partner would not inherit through intestate succession. This private ordering solution is not completely equivalent to the state-law benefit of spousal intestate succession. It requires the couple to take affirmative action (and expend the time and resources necessary) to make a will. It leaves open the possibility that the will could be successfully challenged, thereby defeating the decedent's intent to leave property to the surviving partner, who would have no recourse to intestate succession in the absence of a valid will.[63] But the private ordering solution does give the same-sex couple in many circumstances a means to obtain an approximation of the benefits otherwise available only to married couples.

This, of course, is the position that unmarried Alison and Samantha were in with respect to copyright termination once Congress in 1998 amended the copyright statute and allowed an author to specify by will who should inherit the termination interest if the author dies without any surviving spouse, child, or grandchild. Alison and Samantha were not as well-positioned as if they were legally married (and recognized as such), since Alison's will cannot validly convey any termination interest to Sam if any child or grandchild survives Alison. But the couple was better off than they were before 1998, since they now had a private-ordering mechanism that allowed Alison, at least in some circumstances, to leave to Sam the interest in terminating her transfer to BigPubCo.

When Alison and Samantha married in Massachusetts in 2004, but had federal recognition of that marriage denied by DOMA so that Samantha would not qualify under Section 203 as Alison's widow for purposes of copyright termination, this too was not specific to copyright law, but instead simply reflected the more general unequal treatment facing legally married same-sex couples under federal law at the time. DOMA's "comprehensive

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[61] *See, e.g.*, California Probate Code § 6401.

[62] In some jurisdictions, over some of the period of time in question, same-sex partners could enter into a domestic partnership and state law would recognize a decedent's surviving domestic partner on equal terms with a decedent's spouse for purposes of intestate succession. See, e.g., California Probate Code § 6401. For an insightful history and analysis of California's domestic partnership provisions, see Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 112–154 (2014).

[63] *See generally* Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981).

definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms . . . control[led] over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law."[64] The Supreme Court in *Windsor* noted that "[a]mong the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, *copyright*, and veterans' benefits."[65] The Court gave just a partial list of the benefits and responsibilities that DOMA denied to married same-sex couples:

> Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries.[66]

Thus, if Alison and Samantha married in Massachusetts, their inability to ensure that Samantha would be able to exercise the termination interest if she survived Alison was simply one of the many federal benefits denied to the married couple pursuant to DOMA.

Finally, even after *Windsor* struck down section 3 of DOMA, when copyright law now continues not to recognize Samantha as Alison's spouse as long as the couple lives in a state that does not recognize their marriage, even this unequal treatment is not unique to copyright law. For the most part, in the wake of *Windsor*, the federal government *has* moved to treat legally married same-sex couples and different-sex couples equally regardless of where they live. As Attorney General Eric Holder wrote in a June 2014 memorandum to the president regarding the implementation of the *Windsor* decision, federal

> "[a]gencies have overwhelmingly chosen to recognize marriages as valid based on the law of the jurisdiction where the marriage took place (the 'place of celebration'), regardless of where the couple currently resides (the 'place of domicile'). Given that a majority of states still do not allow or recognize same-sex marriages, this issue often determines whether the federal government can provide marriage-dependent benefits to all same-sex married couples, including those who live in non-recognition states. . . . Many

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[64] United States v. Windsor, ___ U.S. ___, ___, 133 S.Ct. 2675, 2683.

[65] United States v. Windsor, ___ U.S. ___, ___, 133 S.Ct. 2675, 2694 (emphasis added).

[66] United States v. Windsor, ___ U.S. ___, ___, 133 S.Ct. 2675, 2694 (citations omitted).

> agencies had not previously established a standard for marriage recognition, and almost all have now adopted place of celebration rule for program-specific reasons."[67]

For example, the Internal Revenue Service has adopted a rule "recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages."[68]

Nevertheless, the copyright statute is not the only area of federal law where the federal government does not treat same-sex couples equally when they live in a state that does not recognize same-sex marriage. As Holder noted, "[t]wo agencies are prohibited by federal statute from adopting a place of celebration rule for certain programs of critical importance to millions of Americans. The Social Security Administration and the Department of Veterans Affairs are required by law to confer certain marriage related benefits based on the law of the state in which the married couple resides or resided, preventing the extension of benefits to same-sex married couples living in states that do not allow or recognize same-sex marriages."[69]

The hurdles that same-sex couples have faced, and continue to face, in obtaining various spousal benefits arise in large part because those benefits are tied to marriage. Many legal regimes confer privileges on married persons that are unavailable to the unmarried. Decoupling benefits and privileges from marriage would reduce many of these hurdles. For example, if a worker can designate any person of her choice as her survivor for receiving Social Security benefits after her death, then the marital status of the worker and her same-sex partner becomes much less practically significant.

In the case of copyright's termination provisions (and in the renewal provisions that preceded them), though, Congress used marriage (and parentage) very deliberately as a way to prevent transferees from circumventing the reversionary effect of termination. As discussed in Part I, a substantial purpose behind these provisions is to allow an author (or a deceased author's successors) to reclaim a transferred copyright and try to renegotiate a better deal for further use of the copyrighted work. Effectuating reversion becomes much harder if the author can simply

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[67] Eric Holder, Jr., *Memorandum to the President: Implementation of* United States v. Windsor at 3 (Jun. 20, 2014) (hereinafter "Holder Memo").

[68] Rev. Rul. 2013–17, 2013–38 I.R.B. 201, 204.

[69] Holder Memo, *supra* note 67, at 3.

transfer the termination interest to any other party. To return to the hypothetical introduced in Part II, if Alison's future termination interest were freely transferrable, then BigPubCo might well have demanded as part of its 1995 contract with Alison that she grant the company not only the copyright in her novel but also her termination interest. Because this would defeat the reversionary purpose of the termination provisions, Congress made an author's termination right inalienable.[70]

The mandatory statutory designation of who may terminate an author's transfer after the author's death similarly uses marriage (and parentage) to protect against attempts to circumvent reversion by termination. If Alison could simply designate by will who is entitled to terminate after her death, then BigPubCo could have demanded, as part of the 1995 contract, that Alison agree to make a will leaving the termination interest to BigPubCo, and no termination would be possible if Alison died before the time to terminate arrived. The statute prevents such attempts to defeat the reversion of a deceased author's copyright interests by disregarding an author's testamentary disposition of her termination interest whenever the author left a surviving spouse, child, or grandchild. Tying the termination right to marriage helps keep transferees from circumventing termination's reversionary effect, but it has disadvantaged gay and lesbian authors who have generally been unable to marry their same-sex partners.

The various ways in which copyright's termination provisions have over time discriminated against authors in same-sex relationships (and their partners) are thus a microcosm of the history of modern unequal treatment of same-sex couples. And the evolution of how same-sex couples have fared under the termination provisions from 1978 to today shows that while substantial progress has been made on the journey toward full marriage equality, this journey is not yet complete.

B. Copyright Reversion and Marital Status

Just as copyright's termination provisions are not unique in treating same-sex couples unequally, those provisions do not mark the only instance in which copyright law's reversion mechanism has interacted with marriage law in a way that discriminated against some authors.

As noted in Part I, before the 1976 Copyright Act adopted the termination of transfers provision, copyright's renewal system enabled copyright ownership to revert to an author who had transferred it away. A copyright subsisted for an initial term, at the end of which a renewal term of

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[70] 17 U.S.C. § 203(a)(5) ("Termination . . . may be effected notwithstanding any agreement to the contrary . . .").

copyright could be secured. The general rule for most of U.S. history was that the author was the party entitled to secure the renewal. Starting in 1831, the statute specified who could renew a deceased author's copyright. In 1831, the statute provided that if the author, "being dead, shall have left a widow, or child, or children," then any renewal copyright in the dead author's work could be obtained by "such widow and child, or children."[71] The 1870 Copyright Act similarly granted the renewal copyright to "the author . . . if he be still living . . . or his widow or children, if he be dead."[72]

Although there appears to be no judicial decision on the question, in the view of at least some early twentieth-century commentators[73] and legislators,[74] the statutory reference to "widow" encompassed only the surviving female spouse of a deceased male author, and meant that a deceased female author's widower—her surviving male spouse—was not entitled to renew the copyright in his deceased wife's works under the 1831 and 1870 acts.[75]

Indeed, this issue surfaced in the legislative debates leading up to the adoption of the 1909 Copyright Act, and the debate suggests that the statutory term "widow" was seen as excluding "widowers" from the right to renew. In 1906, Congress considered bills that would have made it possible, for works copyrighted *prior* to the bills' enactment, to "extend" the subsisting copyright so that the work's entire copyright term would last for the author's life plus 50 years.[76] Such a subsisting copyright could be

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[71] 1831 Copyright Act, § 2, 4 Stat. 436.

[72] 1870 Copyright Act, § 88, 16 Stat. 212; see also 60 Rev. Stat. § 4954 (1873),

[73] SAMUEL J. ELDER, OUR ARCHAIC COPYRIGHT LAWS 19 (1903) ("[I]f the author be a woman no right of renewal is given her husband."); Samuel J. Elder, *Duration of Copyright*, 14 YALE L.J. 417 (1905) ("The renewal right does not extend to a husband . . ."); 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT M58 (E. Fulton Brylawski & Abe Goldman ed. & comp. 1976) (Some Miscellaneous amendments to S. 6330 and H.R. 19853 proposed to the Copyright Office) (proposal of Edmund A. Whitman) ("I have never been able to understand why the present act excludes the husband, and I see the new Act contains the exclusion."). At least one later commentator also read the nineteenth-century acts this way. Theodore R. Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 717 n. 29 (1944) ("[O]nly the widow was provided for [in the 1831 and 1870 acts]. The male of the species did not receive consideration until the present act.").

[74] H.R. REP. 7083, 59th Cong., 2d Sess. (1907) at 13 ("This renewal right [under present law] does not extend to a husband."); see also H.R. REP. 2222, 60th Cong., 2d Sess (1909) at 15.

[75] The statutory language would appear to allow any surviving children of a deceased female author to secure the renewal copyright under the 1831 and 1870 acts, even though the author's widower apparently could not have done so. Those statutes did not, however, provide for renewal by any other of the author's survivors or testamentary beneficiaries.

[76] *Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly on S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright* 59th Cong. 10 (1906) (§ 18(c) (granting life-plus-50 term to works created after the bills' enactment), § 19 (granting option to extend subsisting copyrights for a term equal to that granted to newly created

extended "by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children, if any survive him."[77] In hearings on the bills, Arthur Steuart, chair of the American Bar Association's copyright committee, noted the gendered language of the statute and suggested amending it:

> Some one has with some degree of propriety suggested that in this day, when many of our most distinguished authors are ladies, it is hardly fair to the husbands to draw an act providing for an extension for the benefit of widows only. If the act is to be logical and you gentleman are husbands and you are going to draw an act for your own benefit, you had better provide for widowers as well as widows.[78]

Steuart's suggestion seems to have been followed, as subsequent bills that retained the extension provision allowed *either* a widow or a widower to secure the extension.[79] Given that the gendered language of the proposed bills paralleled that of the 1831 and 1870 acts, the reading that this language would not encompass the widower of a deceased female author would seem to apply equally to those acts' renewal provisions.

Congress did not adopt the life-plus-50 term provisions discussed in the 1906 hearings, and instead the 1909 Copyright Act retained the existing renewal system. But Congress did eliminate the gender distinction in the statute, providing that a renewal copyright could be secured by "the author . . . if still living, or the widow, *widower*, or children of the author, if the author be not living."[80] But for nearly 80 years from 1831 to 1909,

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works)). For the background on these bills and the extension provision discussed herein, see Barbara Ringer, *Renewal of Copyright (STUDY NO. 31)* 149–50 *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 29–31 (Comm. Print 1961).

[77] *Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly on S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright* 59th Cong. 11 (1906) (§ 19).

[78] *Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly on S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright* 59th Cong. 173 (1906) (statement of Arthur Steuart). Some discussion following this remark included one witness indicating "I think the use of the word 'widow' included both sexes originally," but the discussion was inconclusive on the point. *Id.* at 174.

[79] Barbara Ringer, *Renewal of Copyright (STUDY NO. 31)* 150 & n. 313 *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 29–31 (Comm. Print 1961).

[80] Copyright Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (repealed 1976). The statute also provided for renewal by "the author's executors, or in the absence of a will, his next of kin" if the author was not survived by either a spouse or any children. *Id.* This renewal system applied to

copyright law, by statute, appears to have treated female authors less favorably than male authors. If a female author died before the time came to renew the copyright in her work and left a surviving husband, that husband, as the author's widower, would not have been able to secure a renewal term of copyright and enjoy whatever financial success the work might have in its renewal term.

The copyright statute's facially different treatment of male and female authors between 1831 and 1909 seems consistent with what Justice Brennan later described as an "attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[81] He noted that "[a]s a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes,"[82] of which copyright's renewal provision was apparently one example. The gender distinction in the pre-1909 renewal provisions fits comfortably with stereotypes of husbands as wage-earners and wives as their dependents: the statute treats such presumably dependent surviving female widows more favorably than such presumably wage-earning surviving male widowers. But, of course, the provision disadvantages female *authors*. A female author's inability to leave her renewal interest to her surviving husband was not the most significant form of sex discrimination she faced at a time when women, among other things, could not vote or serve on juries,[83] but for some successful female authors it might have had a substantial economic impact.

The history of copyright's reversion provisions, and the legal landscape for same-sex couples over the last several decades, show that the discrimination against gay and lesbian authors and their partners embodied in copyright's termination provisions is not unique. Other bodies of law have long discriminated against same-sex couples, and copyright law has in the past contained reversion provisions that treated authors and their spouses unequally based on gender.

IV. AVENUES TO FULL EQUALITY

Copyright's termination provisions now treat an author and her same-sex spouse *almost* equally with an author and her different-sex spouse. But

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most, but not all works. *Id.* (providing alternative renewal provisions for posthumous works, works made for hire, and periodical, cyclopaedic, or other composite works).

[81] Frontiero v. Richardson, 411 U.S. 677, 684 (Brennan, J.).

[82] *Id.* at 685.

[83] *Id.*

as explained in Part II.D., full equality has not yet been achieved. The remaining inequality might seem highly technical—whether the identity of a married author's widow or widower is determined by the law of the state where the author is domiciled at death or the law of the state where the author entered into the marriage. But this technical issue has a significant impact on authors. As of April 30, 2015, 13 states[84] do not allow same-sex couples to marry and do not recognize as married for all purposes same-sex couples who get married in a state that does allow them to do so. As a result, gay and lesbian authors who live in any of those 13 states simply have no way (short of relocating to another state) to ensure that copyright law will treat their same-sex spouses as their widows or widowers, entitled to exercise the statutory termination right. These authors cannot marry their partners in their home states. Even if they travel to another state and marry there, the authors' home states will not recognize the marriages, and copyright law will incorporate that denial of recognition. Millions of people currently live in these nonrecognition states,[85] and those who are authors with a same-sex partner are treated unequally by federal copyright law.

This Part considers the avenues available for ending this unequal treatment. First, Part IV.A examines pending Supreme Court cases, due for decision by this summer, that challenge the constitutionality of state laws prohibiting same-sex couples from marrying and barring recognition of same-sex couples' marriages entered into in other states. It considers the possible ways the Court could decide those issues, and what effect each decision would have on copyright law's remaining inequality. Part IV.B. explores how this inequality could be eliminated if the Court's decision does not do so, looking at the possibility of change at both the state and federal levels. Finally, Part IV.C. explains the international dimension of copyright law's unequal treatment of authors and their same-sex spouses, and shows that even a total victory for marriage equality advocates in the

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[84] State bans on marrying same-sex couples in Kentucky, Michigan, Ohio, and Tennessee have been upheld by the Sixth Circuit. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 574 U.S. ___, 135 S.Ct. 1039 (2015) (Order List, Jan. 16, 2015). State bans in North Dakota and Georgia have not been ruled on, though court challenges are pending. In Arkansas, Louisiana, Mississippi, Missouri, Nebraska, South Dakota, and Texas, court rulings striking down state bans have been stayed pending appeal. See http://www.freedomtomarry.org/states/ (last visited Apr. 30, 2015)

[85] Figures from the 2014 U.S. Census show that 71.4% of the population of the United States lives in states where same-sex couples can marry. Human Rights Campaign, *Percent of Population Living in States with Marriage Equality* (Apr. 15, 2015), at http://www.hrc.org/resources/entry/percent-of-population-living-in-states-with-marriage-equality. This figure includes the population of Alabama where, as noted in the text accompanying note 92, *infra*, the status of marriage equality is currently unclear. That leaves nearly one-third of the U.S. population living in states where same-sex couples cannot marry.

Supreme Court would not itself result in equal treatment of authors living abroad.

A. The Pending Supreme Court Challenge & Possible Outcomes

How long copyright law's unequal treatment of same-sex couples will last depends in large part on the outcome of four consolidated cases[86] currently pending before the Supreme Court and collectively referred to as *Obergefell v. Hodges*. These cases are before the Court on a writ of certiorari in a consolidated Sixth Circuit decision upholding state laws (in Kentucky, Michigan, Ohio, and Tennessee) that bar same-sex couples from marrying.[87] The Court granted certiorari on two questions:

> 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?[88]

The Court heard arguments in the case on April 28, 2015, and how the Court rules on each of these questions will largely determine whether the remaining inequality in copyright's termination provisions persists. Those answers could eliminate, reduce, or perpetuate copyright law's unequal treatment of authors with same-sex partners, as the following sections explain.

1. Eliminating Copyright's Unequal Treatment

If the Court rules that states must allow same-sex couples to marry *and* must recognize such couples' out-of-state marriages, then copyright's termination provisions will at last treat gay and lesbian authors with same-sex partners who live anywhere in the United States just as well as it treats authors with different-sex partners. An author will be able to marry a same-sex partner in every state in the union. And an author married anywhere in the U.S. will be able to move to any other state and have her same-sex spouse recognized as her survivor when she dies. If the Court requires states to treat gay men and lesbians and their same-sex partners equally for marriage purposes, then copyright law's incorporation by reference of state marriage law will incorporate uniform equal treatment throughout the United States.[89] Every state would recognize a deceased author's surviving

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[86] Obergefell v. Hodges (U.S.) (No. 14-556); Tanco v. Haslam (U.S.) (No. 14-562); DeBoer v. Snyder (U.S.) (No. 14-571); Bourke v. Beshear (U.S.) (No. 14-556).

[87] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[88] 574 U.S. ___, 135 S.Ct. 1039 (2015) (Order List, Jan. 16, 2015) (Nos. 14-556, 14-562, 14-571, 14-574).

[89] As discussed in Part IV.C., *infra*, an international dimension of inequality would remain even if the *Obergefell* decision results in a uniform *domestic* rule of marriage equality.

same-sex spouse as a spouse, so the survivor would qualify as a widow or widower and be entitled under the Copyright Act to all or at least half of the dead author's termination interest.[90]

2. Reducing Copyright's Unequal Treatment

A split decision on the two questions presented in the *Obergefell* cases would reduce copyright's unequal treatment, but not eliminate it.

a. If the Constitution Only Requires Recognition

The Court could rule that states may refuse to *marry* same-sex couples but must *recognize* those couples' marriages when entered into in another state. Gay and lesbian authors would then face more obstacles to having their same-sex partners treated as their spouses under copyright law than authors with different-sex partners face, but they *could* secure such treatment. Under such a decision, authors in many states would still be unable to marry their same-sex partners, but the couple could travel to any state that does allow same-sex couples to marry, get married, return home, and have their marriage recognized by their home state (and therefore by the Copyright Act). This would give an author and her same sex spouse living anywhere in the United States a path to equal treatment under copyright law.

But this treatment would still impose a hardship on gay and lesbian authors. They would have to find the time and money to travel to a state where they can marry their same-sex partner. This burden may not be inconsequential. If the Court decides that the Constitution allows states to deny marriage to same-sex couples, then these authors may have to travel quite far in order to legally marry a same-sex partner. As of April 30, 2015, in 20 states same-sex couples may marry only because federal courts struck down those state's marriage bans as violative of the federal constitution,[91]

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[90] See text accompanying note 40, *supra*.

[91] Alaska (Hamby v. Parnell, 2014 WL 5089399 (D. Alaska 2014); Arizona (Connolly v. Jeanes, 2014 WL 5320642 (D. Ariz. 2014); Majors v. Horne, 14 F. Supp. 3d 1313 (D. Ariz. 2014)); California (Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010), *appeal dismissed for lack of jurisdiction*, Perry v. Hollingsworth, 725 F.3d 1140 (9th Cir. 2013); Colorado (Burns v. Hickenlooper, 2014 WL 5312541 (D. Colo. 2014); Brinkman v. Long, 2014 WL 3408024 (Colo. Dist. Ct. 2014); Florida (Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014)); Idaho (Latta v. Otter, 19 F.Supp.3d 1054 (D. Idaho 2014), *aff'd* 771 F.3d 456 (9th Cir. 2014)); Indiana (Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *aff'g* 12 F. Supp. 3d 1144 (S.D. Indiana)); Kansas (Marie v. Moser, 2014 WL 5598128 (D. Kan. 2014), *appeal docketed* No. 14-3246 (10th Cir. Nov. 5, 2014)); Montana (Rolando v. Fox, 23 F.Supp.3d 1227 (D. Mont. 2014)); Nevada (Latta v. Otter, 771 F.3d 456 (9th Cir. 2014), *rev'g* Sevcik v. Sandoval, 911 F.Supp.2d 996 (D. Nev. 2012)); North Carolina (General Synod of the United Church of Christ v. Cooper, 12 F.Supp.3d 790 (W.D.N.C. 2014)); Oklahoma (Bishop v. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) *aff'd sub nom* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014)); Oregon (Geiger v. Kitzhaber, 994 F. Supp.2d 1128 (D. Ore.

and in 8 additional states, federal or state court decisions striking down state marriage bans on federal constitutional grounds are currently on appeal (or, in the case of Alabama, under challenge from the state's supreme court).[92] Bans in four other states (Kentucky, Michigan, Ohio, and Tennessee) were upheld by the Sixth Circuit in the cases under review by the Supreme Court, and bans in North Dakota and Georgia have so far not been struck down in court challenges. A decision by the *Obergefell* Court that states can constitutionally ban same-sex couples from marrying would presumably render the state bans in most of those 34 states enforceable. (The effect of such a decision on marriage law in California, Oregon, and Pennsylvania is unclear, since the federal district court decisions invalidating those states' bans were not appealed by the states.[93]) That would leave only 16 states

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2014)); Pennsylvania (Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Penn. 2014)); South Carolina (Condon v. Haley, 21 F. Supp. 3d 572 (D.S.C. 2014)); Utah (Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *aff'g* 961 F.Supp.2d 1181 (D. Utah 2013)); Virginia (Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *aff'g* Bostic v. Rainey, 970 F.Supp.2d 456 (E.D. Va. 2014)); West Virginia (McGee v. Cole, 2014 WL 5802665 (S.D.W.V. 2014)); Wisconsin (Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *aff'g* Wolf v. Walker, 986 F.Supp.2d 982 (W.D. Wisc. 2014)); Wyoming (Guzzo v. Mead, 2014 WL 5317797 (D. Wyo. 2014)).

[92] Alabama (Searcy v. Strange, 2015 WL 328728 (S.D. Ala. 2015); Strawser v. Strange, 2015 WL 1186326 (S.D. Ala. 2015), *countermanded by Ex parte* Alabama *ex rel.* Alabama Policy Inst., 2015 WL 892752 (Ala. Mar. 3, 2015) (ordering state probate judges to discontinue issuing marriage licenses to same-sex couples)); Arkansas (Jernigan v. Crane, ___ F.Supp.3d ___, 2014 WL 6685391 (E.D. Ark. 2014), *appeal docketed* (8th Cir. argument scheduled May 12, 2015); Texas (De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014), *appeal docketed sub nom.* DeLeon v. Abbott, No. 14-50196 (5th Cir. argued Jan. 9, 2015)); Louisiana (*In re Constanza and Brewer*, No. 2013-0052 D2, 15th Judicial District Court, *appeal docketed sub. nom* Costanza v. Caldwell, No. 2014-CA-2090 (La. argued Jan. 29, 2015));Missouri (Lawson v, Kelly, 2014 WL 5810215 (W.D. Mo. 2014), *appeal docketed* No. 14-3779 (8th Cir. Dec. 10, 2014)); Mississippi (Campaign for Southern Equality v. Bryant, 2014 WL 6680570 (S.D. Mississippi 2014), *appeal docketed* No. 14-60837 (5th Cir. argued Jan. 9, 2015)); South Dakota (Rosenbrahn v. Daugaard, 2015 WL 144567 (D.S.D. 2015), *appeal docketed* No. 15-1186 (8th Cir. Jan. 28, 2015)); Nebraska (Waters v. Ricketts, 2015 WL 852603 (D. Neb. 2015), *appeal docketed* No. 15-1452 (8th Cir. Mar. 2, 2015)). In Louisiana, a federal district court opinion upheld the state ban on marrying same-sex couples, Robicheaux v. Caldwell, 2 F.Supp.3d 910 (E.D. La. 2014), and that decision is on appeal, No. 14-31037 (5th Cir. argued Jan. 9, 2015). In Arkansas, a separate challenge is pending in state court as well. Wright v. Arkansas (Ark. 6th Cir. 2014), *appeal docketed* (Arkansas argued Nov. 20, 2014).

[93] In California, the decision in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), was not appealed by the state, and the Supreme Court ruled that the intervenors in the litigation at the trial court did not have standing to appeal, Hollingsworth v. Perry, ___ U.S. ___, 133 S.Ct. 2652 (2013). As a result, it is not clear that a decision by the Supreme Court in *Obergefell* contrary to the trial court's determination in *Perry* on the merits of the federal constitutional claim would lead to any immediate change in the status of marriage equality in California. State officials in Oregon did not appeal the decision in *Geiger v. Kitzhaber*, 994 F. Supp.2d 1128 (D. Ore. 2014), and the Ninth Circuit found that a third party did not have standing to intervene and appeal the decision. 2014 WL 8628611 (9th Cir. 2014). Events in Pennsylvania followed a similar pattern. Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Penn. 2014), *denial of intervention aff'd*, No. 14-3048 (3d Cir. Jul. 3, 2014), though apparently an appeal from the district court's denial of another party's motion to intervene in the proceedings is still pending in the Third Circuit.

(and the District of Columbia), principally in the Northeast, the upper Midwest, and the West Coast, where couples will clearly still be able to marry, because *state* law (whether legislation,[94] referendum,[95] or court decision interpreting a state constitution[96]) authorizes such marriages. So authors in some regions of the nation may need to travel very far from home in order to legally marry their same-sex partners, particularly if they live in the South, the mountain West, or Alaska.[97]

b. If the Constitution Requires States to Marry But Not Recognize

Similarly, a ruling by the Court that states must allow same-sex couples to marry but need not *recognize* those couples' marriages when entered into in another state would continue to impose an extra burden on gay and lesbian authors with same-sex partners but would not deny them equal treatment outright. Consider Alison and Sam, who marry in Massachusetts and later move to Georgia. Georgia would recognize the couple as married under Georgia law if Alison is married to Samuel, but not if Alison is married to Samantha. Alison and Samantha, though married under Massachusetts law, would presumably have to marry again in Georgia in

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[94] Connecticut (2009 Conn. Acts 78 (Reg. Sess.), codified as amended in scattered sections of Conn. Gen. Stat.); Delaware (79 Del. Laws Ch. 19 (2013), codified as amended in scattered sections of Del. Code Ann. tit. 13); Hawaii (2014 Haw. Sess. Laws 1 (2013 2nd Spec. Sess.), codified as amended in scattered sections of Haw. Rev. Stat.); Illinois (2013 Ill. Legis. Serv. 4128 (West), codified as amended in scattered sections of 750 Ill. Comp. Stat.); Maryland (2013 Md. Laws 9, approved by Referendum Question No. 6, Nov. 6, 2012, and codified as amended in scattered sections of Md. Code Ann.); Minnesota (2013 Minn. Laws 404, codified as amended in scattered sections of Minn. Stat.); New Hampshire (2009 N.H. Laws 60, codified as amended in scattered sections of NH Rev. Stat. Ann.); New York (2011 N.Y. Laws 751, codified as amended in scattered sections of N.Y. Consol. Law.); Rhode Island (2013 R.I. Pub Laws 7, codified as amended in R.I. Gen. Laws); Vermont (2009 Vt. Acts & Resolves 33, codified as amended in Vt. Stat. Ann.); Washington (2012 Wash. Sess. Laws 199, codified as amended in Wash. Rev. Code, approved by Referendum Measure 74, Nov. 6, 2012); District of Columbia (57 D.C. Reg. 27 (Dec. 18, 2009), codified as amended in scattered sections of D.C. Code). In Connecticut, the statutory change was preceded by a court decision ruling on state grounds that same-sex couples could marry. Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008).

[95] Maine (2013 Me. Laws 1125, initiated bill approved by voters Nov. 6, 2012 as Question 1, codified as amended in Me. Rev. Stat. tit. 19). In Maine, a direct initiative petition is verified by Maine Secretary of State, then submitted to the Maine Legislature. In this case, the Legislature did not enact it; instead, the Legislature referred the measure to the people for vote.

[96] Iowa (Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)); Massachusetts (Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003)); New Jersey (Garden State Equality v. Dow, 79 A.3d 1036 (N.J. 2013); New Mexico (Griego v. Oliver, 316 P.3d 865 (N.M. 2013)). In addition to these states, a state court ruling has allowed same-sex couples to marry in the city of St. Louis, but does not apply statewide. Missouri v. Florida, 2014 WL 5654040 (Mo. 22d Jud. Cir. Nov. 5, 2014.

[97] Such an outcome would likely be especially difficult on authors living in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, which all appear to bar same-sex couples from marrying, since an author in one of those jurisdictions would have to travel quite far in order to reach a jurisdiction where she could marry her same-sex partner.

order to be recognized as married under Georgia law (and therefore under federal copyright law). Again, this would place a burden on gay and lesbian authors with same-sex spouses that authors with different-sex partners do not face. If those authors move to a nonrecognition state, they would have to expend the time and money to get married in their new state of domicile in order for their same-sex spouses to be recognized.

3. Continuing Copyright's Unequal Treatment

Finally, if the Court decides both questions presented in *Obergefell* in the negative, then copyright law's unequal treatment of gay and lesbian authors will not only continue, but will have more widespread effect than it currently does. As noted above, if the Court affirms the Sixth Circuit's decision that the federal constitution permits states to ban same-sex couples from marrying, then states that currently permit such couples to marry only because of a federal court order based on a constitutional interpretation contrary to the Supreme Court's would again be able to ban such marriages.[98] Only gay and lesbian authors who live in the 16 states that allow same-sex couples to marry as a matter of *state* law, in the District of Columbia, in any states that recognize out-of-state marriages of same-sex couples as a matter of *state* law, and possibly in California, Oregon, and Pennsylvania would be able to have their same-sex partner recognized as their spouse for purposes of copyright law.

B. Eliminating Copyright's Inequality if Obergefell *Doesn't Do So*

If the Court in *Obergefell* rules against the petitioners' federal constitutional claims to equal treatment and answers both of the questions presented in the negative, that decision will leave copyright law's unequal treatment of gay and lesbian authors intact. Because copyright law's unequal treatment of gay and lesbian authors results when *federal* copyright law incorporates unequal *state* marriage law, the continuing inequality could be remedied in one of two ways. Either state marriage law could change and treat same-sex couples equally, or federal copyright law could change and incorporate state law that treats those couples equally. This Section discusses both possibilities.

1. Changing State Marriage Law

If the *Obergefell* Court decides that the U.S. Constitution does not compel states either to allow or to recognize marriages between same-sex couples, then eliminating unequal treatment under copyright law by changing state marriage laws will require changing each state's law

[98] See text accompanying notes 91–92.

individually. If each state that bans same-sex couples from marrying changed its individual marriage law, then same-sex couples would enjoy uniform national equal treatment under copyright law. If every state in the nation acted to allow same-sex couples to marry, or at least to recognize marriages of same-sex couples performed in other states,[99] then any author who married a same-sex partner in a state where the marriage was legal would know that, if she predeceased her spouse, her spouse would qualify as her "widow" for termination of transfer purposes under federal copyright law regardless of the state where the author was domiciled when she died.

This result could be reached in a variety of ways, likely varying from state to state. Some states might decide to allow or recognize marriages of same-sex couples by legislative action,[100] while others might do so by a state court decision.[101] In many states, the change would likely be more arduous than simple legislative enactment or judicial interpretation, since many of the states that bar same-sex couples from marrying have done so by amending their state constitutions. Ending the ban in those states will likely require a subsequent constitutional amendment.[102] The ultimate result would be equal treatment under copyright law for authors with same-sex spouses and authors with different-sex spouses, but this route to equality seems likely to take quite a long time, given the political hurdles involved in many of the states that currently do not recognize marriages between two people of the same sex.

2. Changing Federal Recognition Principles

The *federal* route to equal treatment under copyright law would be more straightforward, requiring only a single change in federal copyright law. Even in the face of unequal state marriage laws, copyright law could be reformed to treat authors' same-sex and different-sex spouses almost fully equally simply by changing the marriage recognition rule in copyright's

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[99] If some states recognized out-of-state marriages of same-sex couples, but did not allow those couples to marry in state, then copyright law would still incorporate by reference the inequality that would require a couple living in a state that does not allow same-sex couples to marry to travel to another state in order to obtain the benefits of a marriage recognized under copyright law. See the discussion in Section IV.A.2.a, text accompanying notes 91–96, *supra*.

[100] See note 94, *supra*.

[101] See note 96, *supra.*

[102] Thirty states have adopted constitutional amendments prohibiting same-sex couples from marrying. See Brief for Respondents at 1a–7a, DeBoer v. Snyder, No. 14-571 (U.S. Mar. 27, 2015) (identifying 35 state referenda regarding same-sex marriage resulting in constitutional bans in all but Maine, Maryland, Minnesota, and Washington; Hawai'i adopted a constitutional amendment allowing the legislature to define marriage to exclude same-sex couples) (http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-571_resp.authcheckdam.pdf).

statutory definition of " 'widow' or 'widower.' " Congress could easily amend federal law to make this change, either by amending the Copyright Act or by addressing federal marriage recognition more globally.[103]

Bills to change the Copyright Act in this way, the Copyright and Marriage Equality Act, are currently pending in both the House and the Senate.[104] These bills would adopt a state-of-celebration rule for marriage recognition by amending the Copyright Act's definition of " 'widow' or 'widower' " to read:

> An individual is the "widow" or "widower" of an author if the courts of the State in which the individual and the author were married (or, if the individual and the author were not married in any State but were validly married in another jurisdiction, the courts of any State) would find that the individual and the author were validly married at the time of the author's death, whether or not the spouse has later remarried.[105]

Under this revised language, as long as an author and her same-sex spouse were validly married under the law of the state where they entered into the marriage (and did not divorce before the author's death), federal copyright law would treat the author's surviving spouse as the author's widow or widower, and the surviving spouse would own at least half of the author's termination interest, even if the author died domiciled in a marriage inequality state.

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[103] Congress has the authority to define in its statutes which state law the statute will look to in order to determine issues to be resolved by reference to state law. Baude, *supra* note 57, at 1401.

[104] H.R. 238, 114th Cong. (2015) (introduced Jan. 9, 2015, by Rep. Derek Kilmer); S. 23, 114th Cong. (2015) (introduced Jan. 6, 2015, by Sen. Patrick Leahy). The amending language in these bills is identical to the corresponding language in the Copyright and Marriage Equality Act, H.R. 5617, 113th Cong. (2014) (introduced in September 2014 by Rep. Derek Kilmer) and S. 2919, 113th Cong. (2014) (introduced in November 2014 by Sen. Patrick Leahy). Neither of those bills was acted on in the 113th Congress.

[105] § 2(a), H.R. 238, 114th Cong. (2015); § 2(a), S. 23, 114th Cong. (2015). See also Brad A. Greenberg, *DOMA's Ghosts and Copyright Reversionary Interests*, 108 NORTHWESTERN U. L. REV. COLLOQUY 102, 108 (2014) (suggesting recognizing surviving spouse for termination purposes based on the law of the state of celebration of the author's marriage). The language in these bills covering couples "not married in any State" would appear to recognize marriages entered into by same-sex couples in foreign countries that allow such couples to marry, regardless of where the author is domiciled at death.

Other bills have been introduced to eliminate other specific federal law provisions that recognize only marriages that are valid under the laws of a person's place of residence, rather than also recognizing those that are valid under the law of place of the marriage's celebration. These bills include the Social Security and Marriage Equality Act, S. 2305, 113th Cong. (2014); H.R. 4664, 113th Cong. (2014) and the Charlie Morgan Military Spouses Equal Treatment Act, S. 373, 113th Cong. (2013).

Another legislative approach would be for Congress to adopt a global state-of-celebration rule that would recognize under all federal laws, including the Copyright Act, any marriage validly entered into. The Respect for Marriage Act,[106] introduced in both houses of Congress in early 2015, would take this approach and amend federal law to recognize each member of a same-sex couple as married to the other for any federal law purpose as long the marriage "is valid in the State where the marriage was entered into."[107] Because the act would apply "[f]or the purposes of *any* Federal law in which marital status is a factor,"[108] if adopted it would appear to override the choice-of-law provision in copyright law's current definition of " 'widow' or 'widower' " that would only recognize marriages as valid based on the law of the author's domicile at death.

As explained above,[109] these approaches would preserve one practical inequality—a same-sex couple living in a state that does not allow them to marry would need to expend the resources to travel to a state that will permit them to marry in order for the author's spouse to be treated as her spouse by federal copyright law, while a different-sex couple could simply marry in their own state. Nevertheless, this revision of the copyright statute would likely allow almost any author who wishes to do so to ensure that her same-sex spouse will be able to exercise the termination interest after the author's death.

The likelihood that Congress will enact either legislative proposal for changing copyright's marriage recognition rule in the near future seems relatively low. Extending termination rights to validly married same-sex couples regardless of their state of residence might also occur by litigation, rather than by legislation. A same-sex spouse of a deceased author who died domiciled in a state that did not recognize the couple's marriage could argue that it violates the federal constitution for *federal* copyright law to determine whether a person is married for purposes of eligibility for *federal* benefits such as the right to terminate a copyright assignment by reference to discriminatory state law. Such a challenge could be based on a claim that copyright law's definition of " 'widow' or 'widower' " impermissibly

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[106] S. 29, 114th Cong. (2015) (introduced Jan. 6, 2015 by Sen. Dianne Feinstein); H.R. 197, 114th Cong. (2015) (introduced Feb. 2, 2015 by Rep. Jerrold Nadler). The relevant provisions of these bills are identical to those of the Respect for Marriage Act, S. 1236, 113th Cong., which was not acted on in the 113th Congress.

[107] *Id.* at § 3. The bill would also recognize the marriage, if it was entered into outside any state, "if the marriage is valid in the place where entered into and the marriage could have been entered into in a State." *Id.* This would appear to recognize marriages entered into by same-sex couples in those foreign countries that allow such couples to marry.

[108] *Id.* at § 3 (emphasis added).

[109] See Part IV.A.2.a., text accompanying notes 91–96, *supra*.

discriminates against an author's same-sex spouse through a classification based on gender or sexual orientation.[110] If two otherwise identically situated couples—Alison and Samuel, and Alison and Samantha—marry in Massachusetts and then move to Georgia before Alison dies, then copyright law *will* treat Samuel as Alison's widower, but will *not* treat Samantha as Alison's widow because of Samantha's gender (she is female, while Samuel is male) and her sexual orientation (Alison and Samantha are lesbians, while Alison and Samuel are heterosexual).

Laws that discriminate based on gender are generally subject to intermediate scrutiny when challenged as violations of equal protection; laws that discriminate based on sexual orientation might also be subject to intermediate scrutiny.[111] But while copyright law's marriage recognition rule has a discriminatory *impact* based on the gender and sexual orientation of an author's spouse, the definition itself is facially neutral: the law does not look *directly* to the gender or sexual orientation of the author's surviving spouse, it simply directs which state law to look to in deciding who is the author's surviving spouse.[112] A law that is facially neutral is considered to classify people based on gender (and is therefore subject to

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[110] For an extended exposition of the argument that laws barring marriage between same-sex couples constitute discrimination based on gender, see Christopher R. Leslie, *Embracing* Loving*: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1089–96 (2014).

The copyright law definition might instead be viewed as treating authors and their spouses differently based on the author's state of residence. If two identically situated authors validly marry spouses of the same sex in Massachusetts, and one author remains in Massachusetts while the other moves to Georgia, then when the authors both die, copyright law will recognize the same-sex spouse of the author who dies in Massachusetts as that author's surviving spouse, but will not recognize the same-sex spouse of the author who dies in Georgia as that author's surviving spouse, based solely on the state in which the author lived at the time of death. Laws that treat people differently based on the state in which they live are not based on a suspect classification (such as race, gender, or possibly sexual orientation), and thus are subject only to rational basis review when challenged as violations of equal protection. Because I conclude, *infra*, that even equal protection challenges to the copyright definition based on gender or sexual orientation claims would likely be subject only to rational basis review, the outcome of any such challenge would not appear to depend on how the court views the challenged classification.

[111] The Supreme Court did not expressly indicate in *Windsor* the level of scrutiny it was using to determine whether the laws at issue violated the equal protection guarantee. The Ninth Circuit has concluded that laws that discriminate based on sexual orientation use a suspect classification and are constitutional only if they survive heightened scrutiny. SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 479–84 (9th Cir. 2014).

[112] By contrast, state marriage laws which refuse to recognize out-of-state marriages of same-sex couples are not facially neutral, but rather on their face make citizens' rights depend on their gender. See Christopher R. Leslie, *Embracing* Loving*: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1089–96 and 1110 (2014). A challenge to the Copyright Act's definition might argue that the definition, properly read, is *not* facially neutral because it must be read to include the facially gender-based state law that it expressly incorporates. If a court accepted that reading of the statute, it should apply intermediate scrutiny to the gender-based state marriage recognition law.

intermediate scrutiny) only if the law has a discriminatory purpose as well as a discriminatory effect.[113]

It is unlikely that anyone challenging copyright law's definition of " 'widow' or 'widower' " could prove that the definition has a discriminatory purpose. The Court has explained that a discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' and not merely 'in spite of,' its adverse effects upon an identifiable group."[114] There is no legislative history indicating that the Copyright Act's definition was drafted in any part because it would treat authors with different-sex spouses differently than authors with same-sex spouses. During the twenty-year revision process that eventually resulted in the adoption of the 1976 Copyright Act, the definition first appeared in the 1965 Revision Bill drafted by the Register of Copyrights.[115] That was the first revision bill that granted a deceased author's termination right expressly to an author's surviving spouse,[116] and the drafters simultaneously included in the bill a definition of " 'widow' or 'widower' "—a definition identical to the definition in the 1976 Act as adopted, except for changes to make the pronouns gender neutral.[117] The text of the Register's report accompanying the draft bill merely restates the definition and does not offer any rationale for choosing the law of the author's domicile at the time of death, and certainly gives no indication that the choice was in any part motivated

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[113] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

[114] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (citations omitted).

[115] H.R. 4347, S. 1006, 89th Cong. (1965).

[116] The first revision bills introduced in Congress during the revision process, H.R. 11947 and S. 3008, 88th Cong. (1964), contained an embryonic version of the termination provisions ultimately included in the 1976 Act, but that version allowed termination by the author's "legal representatives, legatees, or heirs" if the author was dead when the time for termination arrived, and did not expressly reference the author's widow or widower. STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 225 (Comm. Print 1965).

[117] *Compare* H.R. 4347, § 101 ("The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.") *and* 17 U.S.C. § 101 ("widow" or "widower") ("The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried."). The fact that the only changes to the definition during the legislative process made the definition expressly applicable to both male and female authors could also undercut the argument that the definition was adopted with the purpose of creating a discriminatory gender classification.

because there could be a discriminatory effect on authors' surviving same-sex spouses.[118]

The definition was likely included in part in response to the questions that had arisen under the renewal provisions of the 1909 Act. The Supreme Court had ruled in 1956 that the identity of an author's widow, widower, or child, entitled by the Copyright Act to renew the author's copyright, should be determined by looking to state law.[119] But the Court in that case avoided any definitive decision on *which* state law to look to.[120] The Copyright Office in 1960 noted that the Court's decision left open the problem of "deciding conflicts of law questions."[121] The principal committee report on the bill that became the 1976 Copyright Act simply notes that "[t]he terms 'widow,' 'widower,' and 'children' are defined in section 101 in an effort to avoid problems and uncertainties that have arisen under the present renewal section."[122]

Of course, during the entire period from the introduction of the definition in 1965 to its adoption in 1976, no author had any same-sex spouse, and no author had any reasonably foreseeable prospect of having a same-sex spouse. During that period, all states barred same-sex couples from marrying, the Supreme Court had dismissed a case seeking to expand marriage to same-sex couples for want of a substantial federal question,[123] and no state was considering the possibility of allowing those couples to marry. Given the actual historical context in which same-sex marriage was for the most part not even imagined by most legislators as a serious possibility, it seems difficult to think that a choice-of-law rule in a definitional section of a copyright bill was seen as a way to disadvantage gay and lesbian authors and their same-sex partners.[124] More likely, the

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[118] STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 74 (Comm. Print 1965).

[119] De Sylva v. Ballentine, 351 U.S. 570, 580–81 (1956).

[120] The Court noted that "it appears from the record that the only State concerned is California, and both parties have argued the case on that assumption." *Id.* at 581.

[121] Barbara Ringer, *Renewal of Copyright (STUDY NO. 31)* 180 *in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 29–31 (Comm. Print 1961).

[122] H.R. REP. 94-1476, at 125 (1976).

[123] Baker v. Nelson, 409 U.S. 810 (1972), dismissing appeal of 191 N.W.2d 185 (Minn. 1971).

[124] Doug NeJaime has made clear, however, that the issue of marriage for gay and lesbian couples was not completely unknown, in both legal and activist circles, at least by the early 1970s. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 94–97 (2014). And he notes that California in 1977 revised its statutes to make clear that marriage was available only "between a man and a woman" in

Copyright Act's definition simply adopted the usual choice-of-law rule for issues of intestate succession, looking to the decedent's state of domicile to determine the disposition of the decedent's personal property.[125]

If a court were not persuaded that the facially neutral definition of " 'widow' or 'widower' " in the copyright statute was enacted at least in part to discriminate based on the gender or sexual orientation of the author's spouse, then any claim that the definition violates equal protection would be evaluated not under intermediate scrutiny, but only under rational basis review. That means that the definition is constitutional so long as it is "rationally related to a legitimate state interest."[126] Thus, the constitutional question would turn on whether choosing the law of the state where an author is domiciled at death, rather than the law of the state where the author's marriage was entered into, to determine the identity of the author's surviving spouse for purposes of copyright termination is rationally related to any legitimate interest of federal copyright law.

Two pending cases are currently testing the constitutionality of such federal marriage recognition rules in the context of other federal statutes. *American Military Partner Association v. McDonald*,[127] a petition for review pending in the Federal Circuit, seeks review of a decision by the Department of Veterans Affairs interpreting the statutory provisions governing veterans' benefits[128] as allowing the VA to recognize a same-sex couple's marriage as valid only according to the couple's place of residence.[129] Similarly, *Murphy v. Colvin*[130] challenges the Social Security

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response to efforts by same-sex couples to obtain marriage licenses based on non-specific statutory language. *Id.* at 97.

[125] RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 628 (6th ed. 2010) ("In the United States, the almost universally accepted choice-of-law rule for intestate distribution of personalty selects the domicile at death of the decedent."). Of course, under ordinary choice-of-law principles in intestacy cases, a court in the decedent's state of domicile might nonetheless look to the law of another state (e.g., the state in which the decedent got married) to determine the identity of the decedent's widow or children, and then look to its own law to determine how the decedent's property should be distributed to those identified parties. *Id.* at 628 n. 242.

[126] New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[127] No. 2014-____ (filed Aug. 18. 2014), available at http://www.lambdalegal.org/in-court/legal-docs/ampa_us_20140819_ampa-petition-for-review. The petitioner is represented by, among others, the law firm of Morrison & Foerster LLP. While the author of this article is Special Counsel to Morrison & Foerster, he is not involved in any way in the referenced litigation.

[128] These include benefits ("such as disability compensation, death pension benefits, home loan guarantees, and rights to burial together in national cemeteries." *Petition for Review* at 8.

[129] Note, either at the time the marriage was entered into (so the marriage is not valid if the couple traveled from their home state that does not allow same-sex couples to marry to get married in a state that does allow such marriages) or at the time when the right to the benefit in question accrued.

Administration's denial of spousal benefits to a Texas woman whose wife died domiciled in Texas, which does not recognize their marriage in 2010 in Massachusetts.

The petitioner in *McDonald* argues that "[t]he VA's incorporation of state definitions of marital status that discriminate against same-sex couples to determine eligibility for federal spousal benefits . . . violates the Fifth Amendment, including by impinging on the fundamental right to marry and by denying equal protection on the basis of sexual orientation and sex."[131] The plaintiffs in *Murphy* also argue that the Social Security Administration's application of its statute unconstitutionally discriminates on the basis of sexual orientation and gender, and unconstitutionally burdens the fundamental rights to marry and to travel.

If the Supreme Court rejects the petitioners' constitutional claims in *Obergefell*, then the grounds for the Court's rejections, and any subsequent decisions in the *AMPA* and *Murphy* cases, should provide guidance on the likelihood that litigation challenging copyright law's marriage recognition rule could succeed. If the arguments in these pending cases do not succeed, then legislation altering copyright's marriage recognition rule would remain as the principal federal avenue to end copyright law's unequal treatment of authors' same-sex spouses.

C. The International Dimension of Inequality

As explained in Section IV.A, if the *Obergefell* Court rules in favor of same-sex couples on both questions presented in that case, then copyright law will incorporate by reference uniform equal state marriage law throughout the United States. But even that outcome will not give authors with same-sex spouses *complete* equality under copyright law. Instead, the Copyright Act's marriage recognition rule would *still* treat authors with same-sex spouses unequally, at least where those authors live and die outside the United States.

The Copyright Act defines an author's " 'widow' or 'widower' " as the author's surviving spouse "under the law of the author's *domicile*" when the author dies. Most American authors, of course, will be domiciled at death somewhere in the territory of the United States. So if the Court in *Obergefell* decides that the federal constitution compels every state to allow same-sex couples to marry or to recognize their out-of-state marriages, that decision would apply in all of the places where most American authors are

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[130] No. ____ (D.D.C. filed Oct. 22, 2014), available at http://www.lambdalegal.org/in-court/legal-docs/murphy_20141022_complaint.

[131] *Petition for Review* at 10–11.

domiciled. The statute, though, is not limited to domicile *within* the United States,[132] and many authors will be domiciled *outside* the United States when they die.

In some instances, American authors will have moved to a foreign country, established a domicile in that country, and then died there. Famous American authors who lived overseas when they died include James Baldwin, Paul Bowles, Gertrude Stein, and Edith Wharton. In many more instances, non-American authors will die domiciled outside the United States. These authors' works will generally be protected by U.S. copyright, because the Copyright Act grants copyright protection to works by authors who are nationals of most countries in the world.[133] And these non-American authors' transfers of their U.S. copyright rights will be subject to termination under section 203,[134] even if the author has never set foot in the United States.

A favorable decision in *Obergefell* would make marriage between same-sex couples uniformly available and recognized only *within* the United States. Many jurisdictions outside the United States do not recognize same-sex couples as married or allow them to marry.[135] Of course, many people

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[132] Indeed, section 104 of the Copyright Act uses the term "domicile" and the related forms "domiciliary" and "domiciled" in contexts that expressly included domicile outside the United States. 17 U.S.C. § 104(a), (b)(1), (b)(6). There is no indication that Congress intended the term to have a different meaning in § 101 than in § 104.

[133] 17 U.S.C. § 104(a) grants copyright in the United States to unpublished works "without regard to the nationality or domicile of the author," while § 104(b) grants copyright in the United States to published works if "one or more of the authors [of the work] . . . is a national, domiciliary, or sovereign authority" of a country that is a party to the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, or the World Trade Organization Agreement. 17 U.S.C. § 101 ("treaty party" and "international agreement"). Nearly every country in the world is party to one of those agreements. See UNITED STATES COPYRIGHT OFFICE, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 3–9 (2014), available at http://copyright.gov/circs/circ38a.pdf (listing only Afghanistan, Eritrea, Ethiopia, Iran, Iraq, San Marino, and Turkmenistan as countries with which the United States has no copyright relations, and only Kiribati, Nauru, Palau, São Tomé and Principe, Seychelles, Somalia, South Sudan, and Tuvalu as countries for which the status of copyright relations is unclear).

[134] Section 203 expressly provides that if an author's grant of copyright rights is terminated under its provisions, that termination "affects only those rights covered by the grant[] that arise under" title 17 of the U.S. Code, "and in no way affects rights arising under any other Federal, State, or foreign laws." 17 U.S.C. § 203(b)(5). But while the statute expressly limits the *effect* of termination to domestic U.S. rights, it does not limit the *availability* of termination to U.S. authors. Instead, foreign authors who are granted copyright protection in the United States by the U.S. Copyright Act can terminate transfers of their U.S. copyright rights under section 203. Of course, since termination only happens if the author (or her successors) knows of and follows the complicated statutory procedure, many foreign authors may be unlikely to exercise their termination rights.

[135] See Brief For Foreign and Comparative Law Experts Harold Hongju Koh, Thomas Buergenthal, Sarah H. Cleveland, Laurence R. Helfer, Ryan Goodman, and Sujit Choudhry as Amici Curiae In Support Of Petitioners at 14, Obergefell v. Hodges, Nos. 14-556, 14-562, 14-571, 14-574

living in those jurisdictions may nonetheless have legally married a same-sex partner somewhere else, even though the place of their current domicile does not recognize the marriage. If an author dies while domiciled in one of these foreign jurisdictions, then the Copyright Act's current marriage recognition rule would not recognize the author's same-sex spouse as the author's "widow" or "widower" for termination purposes. So, for example, if an American author marries her same-sex spouse in the United States before the couple relocates to Florence, Italy, and if the author dies while domiciled in Italy (which does not recognize same-sex couples as married), U.S. copyright law would not recognize the author's surviving same-sex spouse as the author's widow for termination purposes. Similarly, an Italian author and her same-sex partner ma travel outside Italy and get married, but if the Italian author dies domiciled in Italy, her spouse will not be recognized as her widow for termination purposes. By contrast, the different-sex spouse of an author—American or Italian—who dies domiciled in Italy will qualify as the author's widow or widower who owns some or all of the author's termination interest.

This continuing unequal treatment of married gay and lesbian authors living outside the United States originates in the laws of the countries where the authors live. A decision in *Obergefell* granting uniform *domestic* equal treatment to same-sex couples will therefore not eliminate this inequality from copyright law. Until the marriages of same-sex couples are recognized throughout the world, only a change in copyright's marriage recognition rule will end this inequality. As discussed in the previous section, such a change could come either through legislation or litigation.

On the legislative front, the language of both the Copyright and Marriage Equality Act and the Respect for Marriage Act, discussed in Section IV.B.2, would address this international inequality. By recognizing a same-sex couple's marriage as valid if the marriage was valid in the state where it was entered into,[136] these bills would recognize as married a couple who wed in any state in the United States and was then domiciled overseas. And each bill would provide that if a marriage was not entered into in *any* U.S. state, it would be recognized if it was valid where it was entered into and it either would be recognized by *any* U.S. state,[137] or could have been

(U.S. filed Mar. 6, 2015) (identifying only twenty countries (counting England, Scotland, and Wales separately) that have adopted full marriage equality, and one that recognizes same-sex couples' marriages performed elsewhere), available at http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Foreign_and_Comparative_Law_Experts.pdf.

[136] Copyright & Marriage Equality Act, *supra* note ___, at § 2(a); Respect for Marriage Equality Act, *supra* note ___, at § 3.

[137] Copyright & Marriage Equality Act, *supra* note ___, at § 2(a).

entered into in *any* U.S. State.[138] On the litigation front, whether surviving spouses of authors who died while domiciled abroad could successfully challenge their denial of recognition as "widows" and "widowers" as unconstitutional would likely depend in large part on how the Court resolves the constitutional questions presented in *Obergefell*.

V. PRACTICAL SOLUTIONS FOR AUTHORS & THEIR SAME-SEX SPOUSES

While, as the last Part demonstrates, there are a number of ways to reform copyright law to achieve full equal treatment of married same-sex couples, most of those avenues will take time, at least if the *Obergefell* Court does not decide that the Constitution requires all states to allow same-sex couples to marry. Meanwhile, authors with same-sex spouses must continue to operate under the current, inequitable law. To return to the hypothetical from Part II, given that copyright's termination provisions still do not treat an author's same-sex spouse equally with other authors' different-sex spouses, even after *Windsor* struck down section 3 of DOMA, what steps can Alison take to maximize the possibility that Samantha will be able to enjoy any benefits that might flow from terminating Alison's transfer of copyright to BigPubCo? More generally, what advice should a lawyer give to an author who has a same-sex partner and wants that partner to benefit from copyright's termination of transfer provisions? At least four steps seem clear.

1. *Get married*. If Alison and Samantha haven't yet married in a state that allows them to, they should tie the knot. This will mean that, if Alison dies before Samantha, Samantha can exercise the termination right if Alison remains domiciled in Massachusetts, but also if Alison dies domiciled in Atlanta and the law changes so that either (a) Georgia recognizes her marriage to Samantha in Massachusetts or (b) federal copyright law recognizes Samantha as Alison's widow because they were validly married in Massachusetts. Because the window in which a termination notice can be served remains open for 13 years, it is certainly possible that the law could change over that time. A notice could be served on BigPubCo to terminate Alison's grant as early as 2020 (ten years before the earliest possible effective termination date in 2030) or as late as 2033 (two years before the latest possible effective termination date in 2035). If Alison were to die in 2019, Samantha might not be recognized as Alison's widow in 2020, but if

[138] Respect for Marriage Equality Act, *supra* note ___, at § 3.

the law were to change at some point before 2033, Samantha could then terminate Alison's grant as Alison's widow.[139]

2. *Don't die.* Authors obviously have little direct control over this, but the longer Alison lives, the more likely it will be that she herself will be able to terminate her transfer (and thereafter direct any financial benefits from the termination to Samantha) or that the law will change in a way that would allow Samantha to exercise the termination right if Samantha outlives Alison (for example, if Alison dies domiciled in Atlanta and Georgia law changes to recognize Alison and Samantha's marriage in Massachusetts, or if the federal Copyright and Marriage Equality Act is adopted). [140]

3. *Make a will leaving the termination interest to your same-sex spouse.* As discussed above, if Alison has a valid will leaving her termination interest to Samantha, Samantha will be able to exercise the termination interest under section 203(a)(2)(D), even if Alison dies domiciled in

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[139] A termination notice can be served at any point during a 12-year period, 17 U.S.C. § 203(a)(3)–(4), and the rights secured by the termination notice do not vest until the notice is served, 17 U.S.C. § 203(b)(2). As a result, who is entitled to terminate an author's assignment can change during the notice window. If the author is alive when the window opens then the author is entitled to terminate, but if the author dies before doing so, then the author's surviving spouse and/or children would be entitled to terminate. Similarly, if the author dies before the termination window opens, survived by a spouse and one child, the termination interest is owned by the spouse and the child. But if they do not exercise the termination interest right away, and the spouse then dies, the entire termination interest is owned by the child.

This fluidity regarding who is entitled to terminate at what time may present special difficulties when combined with the copyright act's shifting unequal treatment of author's same-sex spouses. Consider the case of Author, who assigned the copyright in a novel to Publisher in 1980, and who then married his same-sex partner of many years, Spouse, in 2004 in their home state of Massachusetts. Assume that Author died in 2005 in Massachusetts, survived by Spouse and by an adult Daughter. In 2007, Daughter served a termination notice on Publisher terminating Author's 1980 assignment effective on July 1, 2015. Spouse did not join in the termination since in 2007, pursuant to DOMA, the Copyright Act did not at the time recognize Spouse as Author's widow. After the *Windsor* decision struck down section 3 of DOMA, may Publisher now challenge Daughter's termination as invalid, arguing that under *Windsor*, she owns only 50% of Author's termination interest, and so must join with Spouse to effectively terminate?

[140] If Alison and Samantha are married and live in a state that does not recognize their marriage, and one of them is in ill health, they may wish to sue seeking a court order that their state of residence must recognize their marriage. A number of suits in the current wave of marriage equality litigation have been brought seeking such recognition on behalf of couples where one member of the couple faces serious health problems and seeks to establish marriage recognition before that spouse dies. Baskin v. Bogan, First Amended Complaint for Declaratory and Injunctive Relief, 2014 WL 1873842 (S.D. Ind. filed Mar. 31, 2014) (No. 1:14-cv-00355-RLY-TAB) and Entry on Plaintiffs' Motion for a Preliminary Injunction (filed 5/8/14) (granting preliminary injunction requiring Indiana to recognize Massachusetts marriage of same-sex couple where one spouse suffers terminal cancer); Obergefell v. Wymyslo, 962 F.Supp.2d 968 (S.D. Ohio 2013) (same-sex couple married out of state sought TRO requiring that death certificate of terminally ill member of couple would list the other member of the couple as surviving spouse).

Georgia and Georgia does not recognize Samantha as Alison's spouse, as long as Alison is not also survived by any children or grandchildren.[141]

4. *Be careful where you live once you're married.* As discussed above, Alison can ensure that Samantha could exercise the termination right as Alison's widow by choosing to be domiciled in a state that recognizes their marriage. For most authors, the ability of the author's spouse to exercise copyright's termination right after the author's death seems unlikely to be the deciding factor in choosing where to live.[142] (Of course, the author and her spouse may find states that will recognize them as married more attractive relocation possibilities than nonrecognition states, given that recognition will likely provide many marital benefits beyond those related to copyright termination.) But being able to take advantage of the termination right might make a difference for some authors at the margin, particularly if an author has a choice of where to live. For example, when Alison and Samantha consider moving from Massachusetts to warmer climes, in comparing Atlanta and Hawai'i, the fact that one of those states will recognize them as a married couple might have some weight in their decision. A careful choice of domicile might also be relevant if the author has more than one home. If Alison and Samantha don't simply move to Atlanta, but instead buy a home there in addition to their home in Massachusetts, they may be able through some planning to make sure that they remain domiciled in Massachusetts, even while spending winters in Atlanta.

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[141] If Alison does have any children or grandchildren, she might be advised to talk with them about her wish that they share with Samantha any income that results if they exercise the termination interest and reclaim the rights that Alison transferred to BigPubCo. Her wishes would not bind the children, but they might respect those wishes, and presumably that chances that they will do so are greater if Alison expressly communicates those wishes than if she does not.

Alison might also consider ensuring in her will that Samantha is Alison's successor to Alison's contractual rights with BigPubCo. This will ensure that, after her death, whatever royalty payments BigPubCo has been making to Alison will be made to Samantha. It might also help if Samantha will not be able to exercise the termination right because she is not recognized by Georgia as Alison's widow and Alison is survived by children who would be entitled to exercise the termination right. Having succeeded to Alison's contractual relationship with BigPubCo, Samantha could attempt to renegotiate a better deal with BigPubCo. If Samantha and BigPubCo rescind the original contract and enter into a new one, current case law would indicate that Alison's children might then not be able to terminate Alison's original transfer to BigPubCo because it is no longer in existence. *See, e.g.*, Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008). In the decided cases, the party making the rescission and novation with the original transferree was someone who would have been entitled to exercise the statutory termination right, so it is possible that a court might not treat Samantha's rescission and novation in this circumstance as having the same effect of preventing any subsequent statutory termination.

[142] As Baude notes, "[m]ost couples choose to marry someplace where their marriage is recognized, but may have less opportunity to choose where they *live* on that basis." Baude, *supra* note 57, at 1417.

As a practical matter, if Alison has any children, this is the only step that she can take to guarantee under current law that Samantha will be entitled to exercise at least part of the termination right after Alison dies. For most authors, the provisions of copyright law are entirely irrelevant to the choice of where to live, because copyright law will treat most authors the same regardless of the state in which they reside. But if authors with same-sex partners want the same treatment that authors with different-sex partners get, they must choose carefully where to make their home.

CONCLUSION

On its face, the Copyright Act makes no distinction that treats gay and lesbian authors differently than other authors. But for nearly four decades, copyright's facially neutral termination of transfer provisions have operated to disadvantage gay and lesbian authors. Throughout this entire period, a gay or lesbian author has found it either impossible or often very difficult to ensure that the author's same-sex partner would be able to exercise the termination interest if the author died before the termination notice window opens. Authors with different-sex partners, by contrast, have had virtually no difficulty in securing the termination interest for their surviving partners.

The Copyright Act's facially neutral language has resulted in unequal treatment primarily because the statute's choice-of-law rule on marriage recognition has incorporated by reference state marriage laws that deny same-sex couples the right to marry or to be recognized as married. For the first 25 years after the current Copyright Act came into effect, state law in the United States uniformly denied marriage to same-sex couples, so copyright law uniformly refused to recognize the same-sex partner of a gay or lesbian author as the author's surviving spouse. Once states began to allow same-sex couples to marry in 2004, copyright law *still* uniformly refused to recognize even surviving same-sex spouses of gay and lesbian authors as widows or widowers, because DOMA overrode the Copyright Act's marriage recognition rule. When the *Windsor* Court struck down section 3 of DOMA, it enabled the Copyright Act finally to recognize some same-sex surviving spouses as widows and widowers, but it did so unevenly. Copyright law's marriage-recognition rule reflected the uneven treatment of same-sex couples under state law throughout the United States: an author fortunate enough to live (and die) domiciled in any marriage-equality state would find her surviving same-sex spouse recognized for copyright purposes, while an author who died while domiciled in any other state would still find her spouse denied federal recognition. Whether this continuing unequal treatment of gay and lesbian authors will end in the near

future likely depends on whether the Supreme Court rules in *Obergefell* that the federal Constitution requires states to allow same-sex couples to marry.

Even if the Court delivers such a decision in *Obergefell*, the Copyright Act's choice-of-law rule for marriage recognition will continue to treat gay and lesbian authors unequally when authors die domiciled in jurisdictions outside the United States that do not recognize those authors' marriages to same-sex partners. Those who care about copyright law and marriage equality should advocate for Congress to amend the statute to recognize an author's marriage to a same-sex spouse as long as the marriage was valid where it was entered into. At least until gay men and lesbians are able to marry a same-sex spouse everywhere in the world, an extremely generous recognition rule will bring U.S. copyright law as close as it can come to treating gay and lesbian authors and their spouses with full equality, and will relieve authors who live outside the United States of the burden of having to be careful about where they live when they die.

A decision in favor of marriage equality in *Obergefell* would represent substantial progress toward equal treatment for gay and lesbian Americans. For gay and lesbian authors it would secure almost fully equal treatment under copyright law, because copyright's unequal treatment has stemmed from the determination of an author's marital status. But even if a favorable decision in *Obergefell* brings gay and lesbian authors full equal treatment under *copyright* law, it will *not* bring them full equal treatment under law more broadly. *Obergefell* may allow gay and lesbian authors to marry in every state in the union and have their spouses recognized by copyright law. But in most of those states, those authors can still be fired from their jobs, or evicted from their homes, or denied service by a business simply for being gay or lesbian. Marriage equality would bring a successful end to a four-decade journey toward equal treatment under copyright law. But it would only be one (albeit very significant) step toward the goal of a legal system that treats all people equally regardless of their sexual orientation. Outside of the copyright system, substantial work will remain to be done in order to achieve full equality.